Supreme Court, U.S.
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Case No._____

In the Supreme Court

OF THE

United States

JULY TERM, 1994

ROBERT A. AMATO,
Petitioner,
vs.
SECURITIES AND EXCHANGE COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petition for a Writ of Certiorari

Robert A, Amato, *Pro Se*
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504-529-5173

QUESTIONS PRESENTED FOR REVIEW

I. Whether the SEC and the Federal Circuit denied Robert Amato due process of law by applying a varying interpretive Rule over a specific Rule in imposing sanctions on a salesman.

II. Whether Robert Amato was denied due process of law by the SEC and the Federal Circuit?

A. Whether the SEC and the Federal Circuit erred in applying an ex post facto interpretation to a rule of conduct?

B. Whether the SEC and the Federal Circuit erred in unconstitutionally fashioning a new rule of conduct over the course of the regulatory process?

C. Whether Mr. Amato was denied due process by the fact and extent of his punishment?

PARTIES TO THE PROCEEDINGS IN THIS COURT

Robert A. Amato, *Pro Se* is the Petitioner in this court. The Securities and Exchange Commission is the respondent. The National Association of Securities Dealers (NASD) should also be considered a party to this proceeding because the NASD originally filed the disciplinary complaint against Mr. Amato that led to this proceeding.

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Parties to the Proceedings of this Court ii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provisions 2

Statement of the Case 2

Reasons for Granting the Petition 13

Conclusion 30

(A)ppendix:.....31

A. Opinion of the Federal Circuit..... A-1

B. NASD Manual-Rules of Fair Practice
Article III, Para. 2177, Sec. 27 (1990)....A-10

C. NASD Manual-Rules of Fair Practice
According to Art. III, Sec. 27 (f)(1)(1990).. A-12

D. NASD pre-hearing un-solicited
Offer of Settlement dated Sept. 5, 1990.....A -13

E. Addendum to pre-hearing offer: Effect of a
suspension and sanction of $10,000 or more
Securities Exchange Act of 1934, Sec. 15(b)(7) . A-17

TABLE OF AUTHORITIES CITED

CASES

Pages

Aberdeen & Rockfish Railroad Company vs. U.S., 565 F.2d 327 (5th Cir. 1977) 26

Beck vs. S.E.C., 430 F.2d 673 (6th Cir. 1970) 26,29

Blinder, Robinson & Co., Inc. vs. S.E.C., 837 F.2d 1099 (D.C. Cir. 1988);cert. denied 109 S.Ct. 177 (1988).....19

Chesire Hospital vs. New Hampshire-Vermont Hospitalization Service, et al, 689 F.2d 1112, 1117 (1st Cir. 1982) 21

Marco Sales Company v. F.T.C., 453 F.2d 1, 7 (2d Cir. 1971) 22

Mary Carter Paint vs. F.T.C., 333 F.2d 654, 660 (5th Cir. 1964), rev'd on other grounds 382 U.S. 46, 82 S.Ct. 219, 15 L.Ed2d 128 (1965) 22

Montilla vs. I.N.S., 926 F.2d 162 (2nd Cir. 1991) 22

N.L.R.B. v. Deena Products Co., 195 F.2d 330 (7th Cir. 1973), cert. den.73 S.Ct. 29, 344 U.S. 827, 97 L.Ed. 644 (1973).....25

Todd & Co. v. S.E.C., 557 F.2d 1008 (3rd Cir. 1977).....25

United States vs. B&H Dist. Corp., 375 F.Supp. 136, 140 (W.D. Wis. 1974) 22

UNITED STATES CONSTITUTION:

U.S. Const. Amend. Art. 5.....22,24

STATUTES

Pages

15 U.S.C. 78o-3 2,14,25,26

15 U.S.C. 78q-2 19

15 U.S.C. 78s 2

15 U.S.C. 78(y) 2

Securities Exchange Act of 1934; Section 15 (b)(7) A-17

SEC CASES

Alstead, Dempsey, & Company, Inc., 47 S.E.C. 1034 (1985) 6,20,22

Langley-Howard, Inc., et al, 43 S.E.C. Reports 155, Securities Exchange Act Release No. 7986 (1966)..12,21,22,23

In re Willis H. Brewer Jr. / Scott Gray, SEC Release No. 34-31964, 1993 WL 71024,1993 SEC LEXIS 499, Mar. 9, 1993 11,12,21,28

NASD RULES

NASD Manual-Rules of Fair Practice, Article III, Para. 2151, Sec. 1, (1990) 9,13,14,15,16

NASD Manual-Rules of Fair Practice, Article III, Para. 2153, Sec. 3, (1990) 13,24

NASD Manual-Rules of Fair Practice, Article III, Para. 2154, Sec.4,(1990).....9,11,13,16,17

NASD Manual-Rules of Fair Practice, Article III, Para. 2168, Sec. 18, (1990) 9

NASD Manual-Rules of Fair Practice, Article III, Para. 2177, Sec. 27, (1990).....Appendex,3,9,13,15,19,20,21,27

NASD Manual - By-Laws, Article I, Section 5(a), PP 2005 at 2011 (1993) 14

NASD Manual - By-Laws, Article VII, Para. 1181, Sec. 1(a)(1), (2), (1990) 14

NASD Manual - By-Laws, Article XII, Para. 1251 (1990).....14

NASD Manual - By-Laws, Article XIII, Para. 1261 (1990)....14

NASD Manual - By-Laws, Article XIV, Para. 1271 (1990)....14

NASD Manual - By-Laws, Schedule C, Para. 1783, 1784, and 1785 (1990) 14

MISCELLANEOUS

Friendly, Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders,1969 Duke L.J. 199 (1969)..26

15 U.S.C. § 78q-2 congressional history pub. law 101-429; 1990 U.S. Code Cong. and Admin. News 1379 5

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ROBERT A. AMATO,
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SECURITIES AND EXCHANGE COMMISSION,
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Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Federal Circuit is reported at *18 Federal F3d 1281, Fifth Circuit 1994* and is included in the Appendix at pages (A-1 to 9.)

STATEMENT OF JURISDICTION

A. On May 3, 1990, the District Business Conduct Committee for District 5 of the National Association of Securities Dealers, Inc. filed the disciplinary complaint. The matter was heard on March 7, 1991 and decided April 4, 1991. On April 10, 1991, Robert Amato requested an appeal to the Board of Governors of the

NationalAssociation of Securities Dealers, Inc. On August 29, 1991, the decision in the appeal was rendered.

On September 4, 1991, Robert Amato appealed the decision of the National Association of Securities Dealers, Inc. to the Securities and Exchange Commission. The foregoing actions were taken pursuant to 15 U.S.C. 78o-3(h), and 15 U.S.C. 78s(d)(e).

B. The Securities and Exchange Commission rendered its decision on March 10, 1993, and Robert Amato received that decision on March 16, 1993. He timely appealed to the Federal Fifth Circuit Court of Appeals on April 12, 1993 pursuant to 15 U.S.C. 78(y). Mr. Amato filed a motion with the SEC to Stay the sanctions imposed upon him by the SEC. The SEC granted Mr. Amato's motion to Stay the Sanctions on April 14, 1993 which was effective until the Federal Fifth Circuit rendered its decision. On April 20, 1994, the Federal Circuit rendered its decision. Robert Amato received that decision on April 26, 1994. A timely motion for Stay of Sanctions was filed by the *Petitioner* in the court of appeals on June 6, 1994. A decision to deny the *Petitioners'* motion for Stay of Sanctions was rendered by the Federal Circuit on July 5, 1994. Mr. Amato timely filed a Petition for Motion to Stay the of Enforcement of Sanctions with the U.S. Supreme Court together with his appeal of the Federal Circuit decision to this court on July 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment, Art. 5.

STATEMENT OF THE CASE

This is a case involving the regulation of registered securities salesmen. It represents a change in the rules of conduct for salesmen and is among the first cases where a salesman, as opposed to a registered securities principal, was punished by way of a substantial fine and suspended to practice his profession due to price mark-ups in securities. The name of the Over-the-Counter (OTC) stock that is referenced in this case is Barclays West.

The National Association of Security Dealers (NASD) is a self-regulatory organization. The NASD has promulgated Rules of Fair Practice by which members should conduct business. The NASD publishes a manual which contains these written policies, rules, and procedures. Historically, only those entities or persons that are specifically defined in Article III, Section 27 of the NASD Manual - Rules of Fair Practice have ever been held responsible, punished, and/or suspended due to rule violations concerning the price mark-ups in securities. The general securities representative who is only duly licensed to act solely as a salesman is precluded by additional NASD and SEC license requirements from assuming the duties and responsibilities defined by this particular rule.

This is the only case in the history of the United States where a registered general securities representative acting solely as a salesman received a prepared un-solicited pre-hearing offer of settlement from the NASD to accept punishment that actually exceeded the un-solicited pre-hearing offers of settlement directed to the jointly charged registered securities principals, and/or partners of the broker dealer for any alleged rule violation of the NASD.

This is also the only case where General Securities representatives who conducted business in an Office without Supervisory Jurisdiction were ever charged with violations of rules of conduct concerning the price mark-ups in securities.

Mr. Amato is a securities salesman who began his employment with Brennan Ross Securities, Inc. in 1987. Mr. Amato was licensed as a general securities representative and he was not qualified by license to provide Brennan Ross any assistance regarding the supervision of any matter relating to the firms compliance with securities regulations as defined in Article III, Section 27 of the NASD Manual - Rules of Fair Practice. Mr. Amato's relationship with Brennan Ross Securities was contractually considered to be an Agent-Principal relationship. Mr. Amato was an Agent for the Principal, Brennan Ross Securities. (Amato Exb. A-2, NASD Doc. 28, P. 1403) Mr. Amato also acted as the administrative branch manager in New Orleans, Louisiana, but had no supervisory responsibilities. Administratively, Mr. Amato was responsible to pay for the New Orleans office rent, electric bill and telephone bill. Mr. Amato received a bonus of 20% of the office monthly revenue in exchange for assuming this financial responsibility. The New

Orleans Brennan Ross Securities Office was never considered to be an Office of Supervisory Jurisdiction. The Office considered to be the Office of Supervisory Jurisdiction for New Orleans was located at the firms Corporate headquarters in Denver. (Amato Exb. A-3, 4, Doc. 29, 30, TR. pg. 1416, 1424). For purposes of this case, Mr. Amato acted solely as a salesman. (Footnote 4 of SEC Decision, Doc. 101, TR. pg. 2029).

Over a multi-year period, and including the Barclays West transactions, Mr. Amato acted solely as a salesman who recommended at least 12 low- priced OTC initial public stock offerings to the over 900 speculative investors that he personally represented. In each of the IPO's that preceded Barclays West, the total investment proceeds from Mr. Amato's clientele and the commission revenue generated as a percentage of gross proceeds over a three (3) month time frame, was comparable to the proceeds generated by Barclays West during a similar time frame. The member firm acted as a market maker in all of these OTC transactions. When OTC stock transactions are executed at a firm that is a market maker in those same OTC stocks, the transaction is conducted in what is called a "principal basis" When a trade is executed on a "principal basis", the commission must be built into the price of the stock. Any change in the commission charged to the investor will inherently change the price of the stock. All of these transactions were conducted on a "principal basis". (NASD Exb. 11, Doc. 14, TR. pg. 689).

Over the same multi-year period referenced above, the NASD conducted at least one comprehensive annual examination of all of Brennan Ross Securities books and records including trading blotters and pricing procedures maintained at the firms corporate headquarters. In addition, the NASD conducted at least one semi-annual and occasional quarterly examinations with special attention directed towards Brennan Ross corporate trading blotters and pricing procedures. Regular NASD examinations of Brennan Ross Securities were conducted at the National level (Corporate) and various Branch Office levels. All New Orleans office records were maintained in duplicate at corporate headquarters for the purpose of routine regulatory inspection. The NASD concluded all of its previous thorough audits and examinations of all Brennan Ross Securities books and records related to trading & pricing practices

without any serious deficiencies and the firm certainly had no regulatory complaints nor corporate disciplinary history. (Amato Exb. A-5, Tr 1444 exerpt incomplete)

Mr. Amato was one of Brennan Ross Securities' most successful representatives. The security regulators who routinely examined Brennan Ross' corporate trading blotters at the National level most certainly had to have reviewed hundreds and perhaps thousands of transactions that Mr. Amato represented prior to the Barclays West securities transactions that ultimately led to this mark-up pricing complaint. It was never suggested to Mr. Amato nor to Brennan Ross that any business practice that Mr. Amato was personally engaged in might be subject to any regulatory concern. (Various examination letters of exhibit). Brennan Ross Securities had no regulatory disciplinary complaint history regarding any matter. Mr. Amato never had any regulatory disciplinary complaints nor even warnings from either his firm nor any regulatory agency that any activity Mr. Amato was engaging in had even the potential for regulatory concern. In spite of an extraordinarily large clientele, located in almost 40 states, in a highly speculative market, Mr. Amato only had one customer complaint that was dismissed in his favor by the NASD Arbitration Department.

There was nothing unusual in the volume of transactions nor in the manner that the stock of Barclays West was traded from the perspective of the sales staff located in New Orleans.

The Securities and Exchange Commission and the National Association of Securities Dealers did have a complaint about "penny stock" dealers and were intensely investigating them. (*See: 15 U.S.C. § 78q-2 congressional history pub. law 101-429; 1990 U.S. Code Cong. and Admin. News 1379).* On July 31, 1989, the SEC began a comprehensive six (6) day examination of the New Orleans Office of Brennan Ross Securities, Inc. under the Penny Stock Examination Program. (NASD Exb. 19, Doc. 22, TR. pg. 1326) Barclays West actually began trading during the course of this on- sight SEC examination. The SEC Examiner, John Simmons thoroughly reviewed all of the New Orleans Office records including a large number of customer buy and sell orders of low priced security transactions. The SEC found a couple of personnel reporting infractions and alleged securities mark-up violations. (Doc. 22, supra). The SEC confronted Brennan Ross management and

requested action to correct these problems approximately eight (8) weeks after the SEC Investigator left the New Orleans Office. No mention of Barclay's West was made. Brennan Ross management was located in the Denver Corporate Headquarters which was the designated regulatory Office of Supervisory Jurisdiction. (Doc. 22, supra). The SEC reminded Brennan Ross Management that the case of Alstead, Dempsey, & Company, Inc., *47 S.E.C. 1034 (1985)* (NASD Exb. 21B, Doc. 24, TR. pg. 1365) set forth the appropriate standards for mark-ups and asked Brennan Ross to review its procedures for compliance. The Alstead case set the parameters for maintaining proper mark-ups on security sales. On October 6, 1989, Brennan Ross advised the SEC that it distributed the Alstead decision to its trading personnel and its principals at the Corporate Level and to Offices of Supervisory Jurisdiction, and confirmed that all customer buy transactions would be reviewed by the compliance department for excessive mark-ups. The Alstead decision was never distributed to the Brennan Ross New Orleans Office because this office was not considered to be an office of Supervisory Jurisdiction. (NASD Exb. 19A, Doc. 22, TR. pg. 1336). The SEC was apparently satisfied when Brennan Ross distributed a copy of the Alstead case to its trading department and registered principals who were located at the appropriate Supervisory locations. In spite of its own extremely thorough investigation of Brennan Ross Securities Corporate and New Orleans office transactions with regards to mark-ups, the SEC never filed any disciplinary complaint.

Mr. Amato was also very successful in selling the stock of Barclay's West, Inc. This was a highly speculative penny stock and he so advised his customers. (NASD Exb. 22, Doc. 25, TR. pg. 1395). His customers understood the speculative nature of the stock and the pricing methods and agreed to this speculative venture. (Amato Exb. A-13 - 21, Doc. 39 - 47, pgs. 1521 - 1533). The customers had no complaint against Mr. Amato.

Immediately prior to the Barclays West public offering, Mr. Amato and the other sales representative in New Orleans were advised by the President , his partner the head trader, and the Compliance Director of Brennan Ross that there was substantial demand for Barclays West from numerous other Broker- Dealers who would be Market makers in this stock. The President of Brennan Ross advised the New Orleans sales staff that the maximum $400,000 public offering of

Barclays West would sell out easily. After Barclays West went public, the compliance director advised the New Orleans sales staff at all times that the mark-ups for Barclays West were within regulatory guidelines . (NASD Exb. 12, Exb. 3, P 448-449, Amato Exb. A-5) . The sales staff of the New Orleans Office did not learn that Brennan Ross Securities dominated and controlled the market for Barclays West until after the NASD District 5 Business Conduct Committee located in New Orleans filed a disciplinary complaint approximately 9 months later. After Mr. Amato received the complaint from the NASD, he learned that less than $150,000 was raised when Barclays West began trading publicly. That is why the investors who traded through the New Orleans Office and Brennan Ross in general, accounted for such a high percentage of the publicly traded stock. (Supra)

The investigations did not stop. The NASD then began its own investigation into the New Orleans branch office of Brennan Ross in October of 1989 relative to insider trading of stock of "Barclay's West, Inc.". (NASD Exb. 18, 20, 20A, 20B, 22, Doc. 21, 23, 25, supra). It was clear that the NASD investigation was concerned with "insider trading" and had little to do with excessive mark-ups to Brennan Ross customers.

During the course of the NASD insider trading investigation, the executive staff of the New Orleans NASD District 5 office verbally threatened Mr. Amato, and showered Mr. Amato with vulgar and abusive language even though Mr. Amato provided the New Orleans NASD office staff every courtesy and was cooperative with NASD Examiner, Hartmann and his superiors. Mr. Amato wrote letters to the management of NASD District 5 New Orleans Office. After receiving no response, Mr. Amato wrote additional letters to the national management of the NASD located in Washington, D.C. Once again, Mr. Amato received no response. Mr. Amato then wrote letters to the acting directors of the SEC located in Washington, D.C. All of these letters were mailed via U.S. Certified Mail, return receipt requested. Mr.. Amato wrote these letters in order to express his concern over the NASD's heavy handed investigation methods. Mr. Amato also requested information from the various security regulators regarding other issues that were later raised in the disciplinary complaint in which he was ultimately named. Mr. Amato never received any response to any of his letters of concern.

(NASD Exb 20, P. 1338)

On January 30, 1990, the NASD office insisted that the President of Brennan Ross fly to New Orleans immediately at Brennan Ross' expense in order to meet with the executive staff of the NASD's New Orleans Office. On January 31, 1990, the management of Brennan Ross located in Denver flew to New Orleans to meet with the legal staff of the New Orleans NASD District 5 Office. The meeting began with the legal staff of NASD District 5 New Orleans office expressing its concerns about Mr. Amato's writing letters to the various regulatory bodies. Although the letters that Mr. Amato wrote to various security regulators, were disclosed and actually approved by the management of Brennan Ross prior to mailing, the management of Brennan Ross advised the NASD that Mr. Amato would be terminated if he wrote any more letters to any regulatory body. The rest of this meeting concerned issues related to the possibility of insider trading. (NASD Exb 20, P. 1338)

There was no evidence of insider trading. (NASD Exb. 20, 20A, 20B, 22,Doc. 23, TR. pgs. 1338 - 1348, Doc. 25, TR. pg. 1395). The NASD, seeking a return on its investigation, turned to pricing and mark-ups on the Barclay's West, Inc. stock.

Following its investigation which now included mark-ups, the NASD knew that the trading department in Denver, Colorado set all prices of Barclay's West, Inc. stock and approved all sales. (NASD Exb. 20, Doc. 23, supra). The NASD knew that all procedures of Brennan Ross to insure compliance with "Blue Sky" laws were set in Denver. (Amato Exb. A-3, § 12.410, Doc. 29, TR. pg. 1416). The NASD knew that all money and stock transactions occurred in Denver. (Amato Exb. A-3, 12.220, 230 supra). The NASD knew which Brennan Ross personnel were in charge of compliance and trading and that Mr. Amato had no responsibility in this area. (Amato Exb. A-4, Doc. 30, TR. pg. 1424). The NASD knew that the trading department of Brennan Ross in Denver was specifically responsible for examining all sales for compliance with NASD mark-up guidelines, and for pointing out any excessive mark-ups. (Amato Exb. A-1, P. 5, Doc. 27, TR. pg. 1400). The NASD knew that Mr. Amato never modified or varied his commissions among customers. The NASD also knew that Brennan Ross always charged Mr. Amato's clientele the prices set by the Denver Trading Dept. and distributed in the "pink sheets" published by the National Quotation

Bureau. (NASD Exb. 17, Doc. 20, TR. pgs. 890-1113). The NASD knew that a Series 7 salesman had never been held responsible for mark-ups unless he was also a registered principal. (NASD Exb. 21-21C, Doc. 24, TR. pgs. 1349-94).

On May 3, 1990, the NASD filed a complaint against Barry C. Bates, President of Brennan Ross Securities, Inc., Michael Pittman, Head Trader for Brennan Ross Securities, Inc., the company itself, and the four New Orleans General Sales Representatives, Robert A. Amato, William C. Boehmer, Jr., Charles D. Block, Jr., and Adrian Pellegrin. (Pellegrin was also a Registered Securities Principal, but acted as a Sales Representative in this matter). The complaint alleged that all respondents violated Article III, Para. 2151, Sec. 1; Para. 2154, Sec. 4; and Para. 2168, Sec. 18 of the NASD Manual - Rules of Fair Practice, for charging prices for Barclay's West, Inc. stock that was not reasonably related to the current market price and that was marked-up in price greater than ten (10%) percent over the contemporaneous costs to Brennan Ross. The time frame for these sales was the months of August through October, 1989. The complaint further alleged in counts one and two that these actions constituted the use of manipulative, deceptive, or fraudulent devices and that they also violated SEC Rule 10b-5 in manipulating the market price of Barclay's West, Inc. and the respondents failed to disclose to the customers the amount of the mark-up.

Finally, the complaint asserted that the President, Barry Bates, failed to exercise reasonable and proper supervision over the other individual respondents and failed and neglected to establish, maintain, and enforce written procedures governing the imposition of mark-ups, all in violation of Article III, Para. 2151, Sec. 1 and Para. 2177, Sec. 27 of Fair Practice.

In order to proceed under Article II, Section II of the NASD's Code of Disciplinary Procedure prior to hearing, the Association prepared and provided all of the respondents an **unsolicited** offer of settlement on or about Sept. 5, 1990. The President, Mr. Bates was offered **no suspension** and Mr. Pittman who was a Brennan Ross Founder, Partner and Head of Trading was offered a **two week suspension.** Both of these respondents were registered general securities representatives (salesman) and duly Registered Securities Principals in addition to being partners and founders of the firm. Each was offered censure and a fine of **$7,500.** Mr. Bates and Mr. Pittman

immediately accepted their respective unsolicited NASD offers of settlement.

General Sales Representatives, Mr. Boehmer, Mr.Block, and Mr. Pellegrin (Pellegrin was also a Registered Securities Principal) were offered a **two (2) day suspension** from Association with any NASD member. These three respondents were also offered a censure, but **no fine**.

Mr. Amato's pre-hearing unsolicited Offer of Settlement prepared by the legal staff of the NASD District 5 New Orleans office imposed sanctions of a censure, a monetary fine in the amount of **$15,000**, and a **Three (3) month suspension** from association with any member of the NASD.

Mr. Amato, Mr. Boehmer, Mr. Block, and Mr. Pellegrin refused to accept their respective pre-hearing offers of Settlement with the NASD and requested a hearing with the NASD District Business Conduct Committee with the intention of proving that they were innocent of the charges.

On October 16, 1990, Robert Amato filed a request for a change in venue suggesting he could not receive a fair hearing due to the intensity and methods used in the investigation by the local NASD District 5 and the flagrantly **discriminatory** pre-hearing unsolicited offer of settlement he received from the NASD. That request was denied on January 24, 1991 by the National Business Conduct Committee and the matter was scheduled for hearing before the NASD District 5 Business Conduct Committee. By then, Brennan Ross Securities, Inc., Barry C. Bates, its President, and Michael Pittman, the Head Trader, settled with the NASD, and Brennan Ross Securities, Inc. ceased doing business.

The District 5 Business Conduct Committee found that Robert Amato was not the subject of any customer complaints relative to Barclay's West, had not been the subject of any prior disciplinary actions, that he did not manipulate the price of Barclay's West, and he did not practice any fraud or misrepresentation to any customer. However, it did find that Brennan Ross dominated the market in Barclay's West and that customers were charged excessive price mark-ups. The findings were that the Brennan Ross trading department set the wholesale price and the sale price and the difference was the commission to the firm. A percentage of that commission went to the salesmen. The committee found that Robert

Amato violated Article III, Section 1 and Section 4 of the Rules of Fair Practice, which governs the mark-up policy, by failure to question the pricing set by his superiors. All other counts against him were dismissed. In a decision dated April 4, 1991, the NASD District No. 5 imposed sanctions on the salesman. Robert A. Amato was censured, **fined $20,000.00 and suspended for four weeks.** Mr. Block, Mr. Boehmer, and Mr. Pellegrin were censured, and **suspended for one-week. No fine was imposed.** The salesman were also assessed costs of **$2,032.50**, jointly and severally by the NASD.

The case was timely appealed to the NASD's National Business Conduct Committee and on August 29, 1991, that committee upheld the District 5 Business Conduct Committee and increased the sanctions to require re-qualification by examination. The censure, fine and suspension earlier imposed on Mr. Amato remained the same. Mr. Block, Mr. Boehmer, and Mr. Pellegrin, continued to receive a censure and the suspension remained at one (1) week. But, the National Business Conduct Committee decided to also impose a **$5,000 fine** on each of the other three remaining respondents.

The National Business Conduct Committee found that there were "red flags" which showed excessive commissions and therefore, Robert Amato should have questioned the procedures required by his employer, Brennan Ross, Inc. These "red flags" were never identified by the NASD's National Business Conduct Committee.

The National Business Conduct Committee decision was timely appealed to the Securities and Exchange Commission. On March 10, 1993, the SEC upheld the NASD decisions and held "applicants liability is premised on a finding that they should, at the least, have questioned the fairness of the prices charged and failed to do so." (Footnote 16 of SEC decision, Doc. 101, TR. pg. 2029). Although Mr. Amato was never accused in the original NASD District 5 Disciplinary Complaint of failing to question the prices charged by the member firms trading department, he was found guilty of this new charge and severely punished. The SEC waited until the day after the Willis H. Brewer, Jr./Scott Gray case decision was rendered (*In re Willis H. Brewer Jr. / Scott Gray,* SEC Release No. 34-31964, 1993 WL 71024,1993 SEC LEXIS 499, Mar. 9, 1993) before rendering its opinion in Mr. Amato's case. The Brewer/Gray case was used as the "precedent" for finding Mr. Amato liable for excess Brennan Ross markups even though three (3) years had

passed after the NASD filed its disciplinary complaint against him. These two SEC decisions changed the responsibilities of a duly licensed Series 7 general securities representative.

The SEC decision was timely appealed to the Federal Fifth Circuit Court of Appeals located in New Orleans. On April 20, 1994, the Fifth Circuit Court upheld the SEC decision and held "liability could be imposed on securities salesmen for excess markups of stock based on violation of NASD rules of fair practice, where salesman was in position to know whether markups were excessive due to his position as both buyer and seller of stock." (A-2) With reference to *In re Langley-Howard, Inc.*, 43 S.E.C. at 162, 1966 WL 3140, 1966 SEC LEXIS at 15, The Fifth Circuit Court held that "Implicit in the court's holding is that a registered representative could incur liability if he was on notice that the markup he was charging was excessive". (A-7) Mr. Amato had **never** been placed "on notice". In addition, the Federal Circuit upheld the SEC's argument that "The Commission has stated that it will reward such decisions to settle when determining the sanctions to be imposed". All of Mr. Amato's colleagues were generously extended the opportunity on an unsolicited basis to be rewarded with minimal sanctions if they chose to settle this complaint before incurring the risk of additional liability, legal expense, and increased sanctions that may have been imposed as the result of a formal hearing process. The same right was **never** extended to Mr. Amato. The Federal Circuit found that "The majority of stock brokers are not in a position to have enough information and knowledge to be accountable for excessive commissions" and based this finding on the SEC opinion that Mr. Amato "had to be aware that his commissions were a suspiciously high percentage of the prices paid by customers". (A-6) & (SEC opinion P. 5). Mr. Amato was originally charged with an Article I, Section 4 rule violation which governs mark-ups. This charge was never directly addressed by any of the tribunals nor the Federal Circuit which governed the ensuing hearings. Instead, all of the tribunals and the Federal Circuit referred to excessive "commissions", an Article III, Section 3 NASD Rules of Fair Practice violation, with which Mr. Amato had never been charged. Mr. Amato's commissions for the Barclays West transactions were consistent with previous commissions which had been subject to repeated routine

review by the SEC & NASD, and which had never been questioned by those regulatory bodies.

Mr. Amato continues to provide for his family's livelihood as a general securities representative and he currently represents Sunpoint Securities. Aside from this complaint, Mr. Amato has consistently maintained and continues to maintain a commendable regulatory compliance history. Since the May, 1990 NASD complaint concerning mark-ups, Mr. Amato has not been the subject of any further regulatory disciplinary complaints, nor has he been the subject of any customer complaints.

REASONS FOR GRANTING THE PETITION

I.

The Commission & the Federal Circuit erred in applying a varying interpretive rule over a specific rule in imposing sanctions on a salesman and by doing so, Robert Amato was denied due process of law.

The NASD has promulgated Rules of Fair Practice by which members should conduct business. These Rules are often expanded by interpretation of the NASD Board of Governors. One of the Rules, Para. 2177, Sec. 27, requires each member company to establish and maintain a system to supervise each registered representative, with final responsibility resting on that member company. Section 27(b) requires all supervisory procedures to be in writing. This Rule does not have a Board of Governors interpretation because it is very clear. Para. 2151, Sec. 1 and Para. 2154, Sec. 4 of Article III have substantial Board of Governors interpretations because their precise punitive meaning is vague and by definition, varies from case to case. It is under these latter sections that the regulators and the Federal Circuit chose to find violations by Robert Amato. They believe he should have questioned management on the prices charged to his customers. No other registered representative was ever required to do so and the NASD knew that this was new ground. (Doc. 24, supra). The consequences are devastating to a stock broker, and amount to losing the license to practice in this profession.

The National Business Conduct Committee of the NASD in this case found that a registered representative was not simply a

salesperson, and must know and follow all of the rules of the NASD. (Nat'l. NASD decision pg. 13). The District 5 Business Conduct Committee and the SEC decisions conceded for the purposes of this case that Mr. Amato acted solely as a salesman. (Dist. 5 NASD decision pg. 11, SEC decision note 4). The Federal Circuit determined that Mr. Amato was the branch manager of the New Orleans Brennan Ross Office and Mr. Amato had enough knowledge to determine that the markups were excessive due to "Amato's position as both buyer and seller of the Barclays stock". (*18 Federal F3d 1281, Fifth Circuit 1994*) The confusion of these regulators and the Federal Circuit over the role of Mr. Amato points out the less than clear obligations placed upon a stock broker who is acting solely as a salesman in a heavily regulated industry.

The National Association of Securities Dealers, Inc. derives its power from Congress. 15 U.S.C. 78o-3. In turn, the NASD is a corporation governed by a Board of Governors. NASD Manual - By-Laws, Article VII, Para. 1181 (1990). The Board of Governors adopts and interprets the "Rules of Fair Practice." NASD Manual - By-Laws Article VII, Para. 1181, Sec. 1(a)(1), (2), (1990). The Rules of Fair Practice are initially voted upon by the member firms and interpreted and enforced by the Board of Governors. NASD Manual - By-Laws Article XII, Para. 1251 (1990). The Board also establishes procedures for disciplinary proceedings and imposition of sanctions. NASD Manual - By-Laws Articles XIII, Para. 1261 and Article XIV, Para. 1271 (1990). Schedule C of the NASD By-Laws distinguished between a member firm, a registered securities principal, and a registered representative. NASD Manual By-Laws, Schedule C, Para. 1783, 1784, and 1785 (1990).

In it's decision, the Federal Circuit premised Mr. Amato's liability on Article I, Section 5(a) of the NASD Rules of Fair Practice. *(NASD Manual*, Article I, Section 5(a), PP2005 at 2011 (1993). The Federal Circuit stated that "(p)ersons associated with a member shall have the same duties and obligations as a member under the Rules of Fair Practice. As a registered representative, he was obligated to comply with Sections 1 and 4 of the Rules of Fair Practice. "

Article I, Section 5(a) is completely contradicted by other published NASD rules and procedures that clearly differentiate

between the duties and obligations of the different types of associated persons and the member.

The By-Laws make clear that management and supervision fall upon member firms' duly licensed principals.

The NASD Manual-Rules of Fair Practice are very specific about supervision. Article III, Para. 2177, Sec. 27 (1990) (A-10)

Because various factors must be considered, the regulation of prices must be done by management who at the very least, must be conveniently located in an Office of Supervisory Jurisdiction. Art. III, Sec. 27 (f)(1) (A-12)

Those factors are generally not available even to a sales representative who is located in an" Office of Supervisory Jurisdiction." Mr. Amato's business location was never considered by any regulatory body to be an "Office of Supervisory Jurisdiction" (Amato Exb. A-1, Pg. 1400, Exb. A-2, P. 1403, NASD Exb. #3, P. 0164,0437,0442) and to place that responsibility on the sales representative is unfair, catastrophically burdensome, and totally impractical. The sales representative must be able to function expeditiously and to do that he must be allowed to work within the parameters set by the member - his employer - upon whom that responsibility has been legislatively placed.

Brennan Ross followed that requirement and put into writing its specific rules related to trading and pricing. Those written rules from the Brennan Ross Procedure and Policy Manual provide in paragraph 5 of "Trading":

par. (5). " All mark-ups and mark-downs shall be consistent with the NASD and SEC guidelines and must be strictly adhered to. The NASD 5% mark-up policy is a guideline and not a rule. It will be the responsibility of the Trading Department to point out any mark-ups that seem excessive. This policy applies to all principal and agency transactions with the exception of securities which are sold subject to and under the cover of a current prospectus. SEC Rule 10B-10 further adds that on all principal, simultaneous-riskless transactions, the mark-up or mark-down must be disclosed on the face of the confirmation. (Amato Exb. A-1, Doc. 27, TR. pg. 1400)

Every single exhibit in this case at all four levels of hearing demonstrate that the obligation for pricing and mark-up compliance is on the principals and not the registered representatives. For example,

NASD exhibits 18, 20, 20A, 20B, and 22 are the official memoranda of the investigation. All mark-up questions were directed or referred to the trading department in compliance with Brennan Ross policy. The Brennan Ross principals considered themselves responsible. (Amato Exhibits 3, 4, 5 pg. 20).

The Rules of Fair Practice that were deemed violated provide as follows:

Article III, Para. 2151, Section I of the NASD Manual-Rules of Fair Practice (1990) states that:

A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.

Article III, Para. 2154, Sec. 4 of the NASD Manual-Rules of Fair Practice (1990) states that:

Sec. 4. "In "over-the-counter" transactions, whether in "listed" or "unlisted" securities, if a member buys for his own account from his customer, or sells for his own account to his customer, he shall buy or sell at a price which is fair, taking into consideration all relevant circumstances, including market conditions with respect to such security at the time of the transaction, the expense involved, and the fact that he is entitled to a profit; and if he acts as agent for his customer in any such transaction, he shall not charge his customer more than a fair commission or service charge, taking into consideration all relevant circumstances including market conditions with respect to such security at the time of the transaction, the expense of executing the order and the value of any service he may have rendered by reason of executing the order and the value of any service he may have rendered by reason of this experience in and knowledge of such security and the market therefor."

Those rules have been the subject of lengthy Board of Governors' interpretations, even to the extent that the Board has said that mark-ups are a case by case matter and any specific percentages are guides, but not rules. (See: NASD Manual-Rules of Fair Practice, Article III, Para. 2154, Sec. 4, (1990), Interpretations of the Board of Governors).

The Board of Governors interpretations place the burden of compliance on a "member," not on a registered representative. (Id. at Para. 2154, Sec. 4, Pgs. 2054-2058). The Federal circuit erred in repeatedly referring to Mr. Amato as buyer and seller of stock. Only the member buys and sells stock. The underlying rationale supports that interpretation. The following is an excerpt from the Board interpretation:

In a letter to the membership on October 25, 1943, the Board of Governors made known the results of its survey and expressed its philosophy on what constitutes a fair spread or profit. The Board stated that" it would be impractical and unwise, if not impossible, to define specifically what constitutes a fair spread on each and every transaction because the fairness of a mark-up can be determined only after considering all of the relevant factors. Under certain conditions a mark-up in excess of 5 per cent may be justified, but on the other hand, 5 per cent or even a lower rate is by no means always justified. The Board instructed District Business Conduct Committees to enforce Section 1 of Article III of the Rules of Fair Practice with respect to mark-ups, keeping in mind that 71 per cent of the transactions computed from the questionnaires were effected at a mark-up of 5 per cent or less." The philosophy which the Board expressed has since been referred to as the "5% Policy." (Id. at page 2055).

The mark-up rule is a philosophy or a policy of business conduct. It is subject to interpretation. It is a philosophy that must emanate from the "members" or management principals, not from a salesman. The Rule of this case, if it is allowed to stand, is that a salesman must question the management philosophy or policy of the employer on a daily transactional basis. That could result in an untenable working relationship. For example, each New Orleans stockbroker in Merrill Lynch or Dean Witter would have to question his or her New York home office management policy before each transaction, to ensure that the home office was complying with the Rules of Fair Practice in dictating prices and trading parameters. That is reversing normal and reasonable business practices.

The evidence in this case demonstrates that a regulatory investigation to determine the basis for a singular securities mark-up and pricing takes many weeks, if not months, of statistical analysis to conclude.

The rationale for not holding a registered representative liable is because he or she truly does not have the market information available to them. The NASD investigator, Brian Hartmann admitted that fact.

MR. PATTERSON:

"Brian, based on your going into the branch, were there sufficient records on site for you to make a mark-up determination"?

BRIAN HARTMANN:

"No, sir."

MR. PATTERSON:

"So, you had to go to their headquarters as well to reconstruct the trading patterns and the mark-ups?"

BRIAN HARTMANN:

"Correct, and also the other dealers involved to determine the mark-up."(Doc. 3, pg. 195 of Hartmann testimony)

Mr. Hartmann had to conduct extensive and voluminous outside research that involved the cooperation of the trading and compliance departments of multiple broker dealers domiciled throughout the United States. (See: NASD Exb. 13-16A, Doc. 16-19). A trained investigator has to look at the market if for nothing else but to exclude other meaningful activity. If Mr. Hartmann had to go outside the New Orleans office to determine this issue, then it is only fair that the regulatory community provide the salesman, in advance, with the training, means and mechanisms to conduct the salesman's own independent examination and consequently warn the salesman, in advance, that the salesman must go outside of the local business office to determine appropriate pricing, including mark-ups and mark-downs, on all securities transactions.

Pricing of penny stocks was difficult and therefore was under the direct control of the head trader. It took an NASD investigator weeks and compilation of documents from various places to reach any conclusion on the pricing. (Doc. 3, TR. pg. 88, Hartmann pgs. 79-83, 194). In fact, on October 15, 1990, prior to this matter being heard, the United States Congress passed a law providing for an automated quotation system for penny stocks "to improve significantly the information available to brokers, dealers, investors, and regulators." 15 U.S.C. § 78q-2.

Nevertheless, the regulatory authorities concluded for the first time that a Series 7 Registered Sales Representative should be

punished because he should have questioned his superior's rules and regulations and their method of doing business, even though heavily regulated and reviewed by that same regulatory authority.

All of the tribunals and the Federal Circuit completely ignored the efforts of the NASD investigator Hartmann, and to do so, they swept the testimony of Mr. Hartmann, under the table. Mr. Hartmann's testimony that there were insufficient records on site at the local office level to make a mark-up determination was simply regarded as a potted plant and never addressed nor rebutted. NASD investigator Hartmann had to go outside of the New Orleans office to determine mark-ups. Furthermore, the New Orleans office was not an office of supervisory jurisdiction. (Amato Exb. A-2, Doc. 28, TR. pg. 1403; Article III, Para. 2177, Sec. 27(g)(1)(1990)).

It is submitted that unless the regulatory community provides the means for a registered salesman to accurately conduct the same type of investigation on every single securities transaction in a far more timely basis, the entire securities industry is likely to grind to a halt. No investor will be able to buy or sell any security, including bonds, without the salesman directly challenging and investigating the mark-up, mark-down, and pricing history of each and every broker dealer who actually is directly involved with the determination of the pricing of those specific securities. That is why brokerage firms have trading departments and compliance departments. That is why they are specially licensed to undertake that responsibility.

It is not fair to require a small firm trading in penny stocks to undertake a responsibility not required of large firms. Such conduct is specifically proscribed by *Blinder, Robinson & Co., Inc. v. S.E.C., 837 F.2d 1099 (D.C. Cir. 1988); cert. denied 109 S.Ct. 177 (1988).* It might seem reasonable on its face to require small firm employees to be more active in "questioning" the policy or philosophy of its management, but that theory fails as the firm grows in size. It is submitted that in the larger firms, that would be just cause to fire an employee.

Robert Amato is not here suggesting that he or any salesmen can ignore clear rules of conduct. He does urge that a registered representative should be allowed to function within the parameters of his contractual rights and obligation with his employer, particularly when that employer's contract obligations arise out of specific NASD Rules (Para. 2177, Sec. 27).

As set out above, the NASD "mark-up" policy is not a clear cut rule. The leading SEC case on mark-ups is Alstead, Dempsey & Company, Inc., *47 S.E.C. 1034 (1985),* (NASD Exb. 21B, Doc. 24, TR. pg. 1365). Therefore, Mr. Amato went to the SEC Senior Trial Counsel in that case and asked for a factual and legal analysis of the "mark-up" rule as applied to this case. (Doc. 69, TR. pg. 1629-48).

Mr. Peter B. Schaeffer did such an expert analysis. He demonstrated how this "philosophy" is applied, and that making a determination of any violation is an unreasonable burden to place on a registered representative. Mr. Schaeffer reached this conclusion after considering very specific factors.

In Mr. Schaeffer's affidavit, he states that in order to determine whether or not a violation has occurred, it must first be determined that the principal is not entitled to a "market maker" spread. Such a determination is a quantitative and statistical one which requires a full survey of the books and records of each market participant. (Confirmed by the NASD's investigator Hartmann).

Next, it must be recognized that it is customary for a registered representative to rely on his employer firm to set a permissible price spread. That is because pricing is dependant upon the amount of compensation the principal pays to its salespersons, the principal's overhead, and the trading profit earned by the principal for its willingness to serve as, and to assume the risk of being, a "market maker." Mr. Schaeffer also noted that the wholesale or strike price does not equal costs and that contemporaneous customer sales and purchases do not equal contemporaneous costs. Finally, Mr. Schaeffer concluded that the amount of compensation a salesman receives is not related to the "mark-up" for various reasons, including the fact that the market maker trading profits can be shared with the salesman.

Mr. Schaeffer's expertise and analysis were never challenged or rebutted. In fact, they were ignored and never directly addressed. To the contrary, the regulators concluded not that Mr. Amato directly committed a wrong, but that he should have questioned the price so that others could conduct a price investigation. That does not make legal sense and is a violation of Mr. Amato's right to due process when that very obligation and duty has already been assumed contractually by his employer (Amato Exhibits 3, 4, 5, pg. 20) and is

perfectly consistent with specific NASD Rules (Para. 2177, Article III, Sec. 27) (A-10)

II.

Robert Amato was denied due process of law by the Commission and the Fifth Circuit.

A. The Commission and the Fifth Circuit erred in applying an ex post facto interpretation to a rule of conduct.

The regulators delayed their decision in this case for four years. In that time, a contrary interpretation emerged. In fact, one day before the SEC opinion in this case was rendered on March 10, 1993, the case of *In re Willis H. Brewer, Jr./Scott Gray* , SEC Release No. 34-31964, 1993 WL 71024,1993 SEC LEXIS 499, Mar. 9, 1993 was decided. This decision held a registered representative liable for mark-ups and was cited as a precedent in this case. It appears that the SEC waited for this after the fact precedent.

The Federal Circuit held that " This argument is completely without merit. While there are no cases before Willis Brewer holding a registered representative liable, none of the SEC cases preclude this possibility." **(A-7)**

That is patently unfair and a denial of due process since it is impossible to expect a registered representative in 1989 to anticipate the SEC would change its mind in 1993 by reversing the only SEC interpretation on this issue which is *Langley-Howard, Inc., et al,* 43 S.E.C. Reports 155, Securities Exchange Act Release No. 7986 (1966). The Brewer Case reversed *Langley-Howard.* The Amato and Brewer SEC decisions changed the responsibilities of a duly licensed Series 7 general securities representative.

Sections 1 and 4 of Article III of the Rules of Fair Practice require interpretation on a philosophical basis. Therefore, the Rules should be interpreted as of 1989 when the alleged violations took place. That methodology is important because the NASD interpretation of the rules is binding on the agency and is elevated to the status of a congressional law. *Chesire Hospital vs. New Hampshire-Vermont Hospitalization Service, et al, 689 F.2d 1112, 1117 (1st Cir. 1982).* If the interpretation is changed after the fact,

then it is nothing more than an ex post facto law. When an ex post facto change occurs in administrative rules, it becomes a denial of due process of the Fifth Amendment of the U.S. Constitution. See: *United States vs. B&H Dist. Corp., 375 F.Supp. 136, 140 (W.D. Wis. 1974).* That is clearly the case here. Ignoring an existing rule is a denial of due process. *Montilla vs. I.N.S., 926 F.2d 162 (2nd Cir. 1991).* As the Honorable John R. Brown stated in a concurring opinion:

"Our complex society now demands administrative agencies. The variety of problems dealt with make absolute consistency, perfect symmetry, impossible. And the law reflects its good sense by not exacting it. But law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case." *{Mary Carter Paint vs. F.T.C., 333 F.2d 654, 660 (5th Cir. 1964),* rev'd on other grounds 382 U.S. 46, 82 S.Ct. 219, 15 L.Ed2d 128 (1965)}.

He went on to state:

. . . "But so long as that is the rule, the commission may not nullify it by individual decision while ostensibly holding it out as the standard for others." Mary Carter Paint, 333 F.2d at 660.

Although that case was reversed, the principle enunciated is valid. *Marco Sales Company v. F.T.C., 453 F.2d 1, 7 (2d Cir. 1971).*

The regulators must concede that there were no cases holding a registered representative alone liable for mark-up violations.

To the contrary, the only SEC interpretation on that issue was *Langley-Howard, Inc., et al,* 43 S.E.C. Reports 155, Securities Exchange Act Release No. 7986 (1966). Peter Schaeffer, the Alstead, Dempsey prosecutor gave the following interpretation of Langley-Howard:

23. "Under very express circumstances, the SEC has recognized that the fact of a large commission does not warrant a finding that an account executive is liable for a markup violation by the dealer. In *Langley-Howard, Inc. et al.* 43 SEC Reports 155, Securities Exchange Act Release No. 7986 (1966), the SEC set aside findings by the NASD that salesmen were liable for the markup violation by the registered dealer.

24. In Langley-Howard, the salesmen were promised a commission of $1.00 per share to sell stock to customers at retail prices of $6.00 and $6.25 or a commission percentage of sixteen percent(16%). The SEC disregarded the amount of the compensation and, instead, focused on the evidence, if any, that the salesmen knew or should have known that the retail prices were not representative of the current market. In setting aside the NASD finding of violation, the SEC held as follows:

"But irrespective of the amount of compensation they received, there is no evidence in the record that they knew or should have known that generally no inter-dealer sales were effected by the member or other dealers at or about the offers quoted in the sheets and therefore that those offers were not fairly representative of the current market." (Amato Exb., Doc. 69, TR. pg. 1629, pg. 7)

Mr. Amato has argued from the beginning that it is not fair to change the rules in the middle of the game. The fair and appropriate regulatory procedure regarding the issue of pricing, which include mark-ups and mark-downs, would simply be to put the NASD membership on notice that registered representatives will be prosecuted for pricing violations.

With reference to *In re Langley-Howard, Inc.*, 43 S.E.C. at 162, 1966 WL 3140, 1966 SEC LEXIS at 15, The Fifth Circuit Court held that "Implicit in the court's holding is that a registered representative could incur liability if he was on notice that the markup he was charging was excessive". (A-7) Mr. Amato had never been placed "on notice".

Further, because of the fact that the commissions and mark-ups charged to Mr. Amato's clientele by the Brennan Ross Trading Department had been subject to continued scrutiny by the NASD & SEC and had never been questioned by those entities, Mr. Amato had no reason to think that he would ever be put "on notice".

It seems clear that the NASD, SEC, and Federal Circuit want to change the law or rule interpretation in this case. The SEC opinion attempts to distinguish Langley-Howard, but regardless, stated it would rule differently today. However, the rule the SEC and the Federal Circuit want to fashion now should not be applied retroactive to conduct in 1989 when Langley-Howard governed.

Because this new interpretation constitutes a substantial change in philosophy without proper advance notice and warning, it is a denial

of due process. *U.S. Const. Amend. Art. 5; 15 U.S.C. 78o - 3(h)(1)(2).*

B. The Commission & the Federal Circuit erred in unconstitutionally fashioning a new rule of conduct over the course of the regulatory process.

Article III, Section 3 of the Rules of Fair Practice provides in part:

"Charges, if any, for services performed . . . shall be reasonable and not unfairly discriminatory between customers." The charges referenced here mean commissions.

Mr. Amato was not charged with a violation of this section, but the regulators and the Federal Circuit continue to find that, because the salesmen could vary their commissions among customers, they had control over pricing. Only Mr. Boehmer testified he varied the commission between customers. (He waived or reduced his commission for a good customer). Subject to supervisory and compliance approval it is customary that all sales commissions are negotiable on any security, bond, or mutual fund that is publicly traded.

Mr. Amato testified that Brennan Ross always charged his clientele the spread set by the trading department (Doc. 25, pg. 3 supra). This same spread was also published daily in the "Pink Sheets" published by the National Quotation Bureau. Yet, the NASD is attempting to use a perceived violation by Mr. Boehmer of Section 3, as a violation by Mr. Amato of Sections 1 and 4. Irrespective of what Mr. Amato could have done, the commission charged was set by his employer's trading department and was published daily in the "Pink Sheets".

That factor points out the charges against Mr. Amato are truly unclear and vague. At all three regulatory levels, the regulators apparently concede that as a salesman, Mr. Amato did not directly violate any rules. The District 5 Business Conduct Committee held that Mr. Amato should have investigated. (Doc. 57, pg. 10, supra). The National Business Conduct Committee believed there were "red flags" to alert Mr. Amato to question the prices. These "red flags" were never identified. (Doc. 72, pg. 14, supra). The SEC premised Mr. Amato's liability not on his charging unfair prices, but upon his failure to question the fairness of the prices. (Doc. 101, pg. 5, 6 note 16, supra). The Federal Circuit stated "the majority of stock brokers

are not in a position to have enough information and knowledge to be accountable for excessive commissions" (A-6) and based Mr. Amato's liability on the SEC opinion that he "had to be aware that his commissions were a suspiciously high percentage of the prices paid by customers". (SEC opinion P. 5). Mr. Amato was originally charged with an Article I, Section 4 rule violation which governs mark-ups. This charge was never addressed by any of the tribunals which governed the ensuing hearings nor the Federal Circuit. Instead, all of the tribunals and the Federal Circuit referred to suspiciously high "commissions" as sufficient knowledge to determine if mark-ups were excessive. Mr. Amato's commissions for the Barclays West transactions were consistent with previous commissions which had been subject to review by the SEC & NASD, and which had never been questioned by those regulatory bodies.

Mr. Amato was not charged with his failure to be suspicious and his failure to question the actions of his employers. He was charged with intentionally charging unfair mark-ups and manipulating the price and failing to disclose these actions to his clients. He was not found guilty of any of these charges. The SEC and NASD have fashioned a new count after the fact, by simply changing the terminology to commissions. If NASD examiner Hartmann and SEC examiner Simmons could simply determine excess mark-ups by way of the commission alone, they would not have had to seek information outside of Mr. Amato's office to make a mark-up determination. That is a denial of due process. (*15 U.S.C. 78o-3(1)(2); Todd & Co. v. S.E.C., 557 F.2d 1008 (3rd Cir. 1977).*

Remember, the SEC was undertaking a concurrent investigation at the time of the NASD investigation and directed no complaints toward Mr. Amato relative to these issues (Doc. 22, supra). The burden of proof is upon the administrative agency to prove its allegations. *N.L.R.B. v. Deena Products Co., 195 F.2d 330 (7th Cir. 1973), cert. den. 73 S.Ct. 29, 344 U.S. 827, 97 L.Ed. 644 (1973).* It is neither fair nor due process to find him liable for a wrong for which he was never charged. *15 U.S.C. 78o-3(h)(1)(2).*

The SEC & The Federal Circuit speculate that Mr. Amato's role in this incident as administrative office manager was "especially troubling because of the knowledge he possesed." (A-6) Mr. Amato's knowledge of the size of the New Orleans office phone &

electric bill did not vest Mr. Amato with "knowledge" of Brennan Ross' Trading Departments mark-up and pricing procedures.

The SEC & the Federal Circuit speculate that Mr. Amato was vested with special knowledge because he personally represented a clientele that held at least twenty-five percent of Barlcay's West stock. The NASD District 5 Business Conduct Committee determined in its decision that there was no evidence that Mr. Amato knew that Brennan Ross dominated the market for Barclays West nor any evidence that Mr. Amato was aware that his clientele controlled 25% of Barclays West stock. The market domination charge was actually dismissed as a result of the NASD District 5 Business Conduct Committee decision. It is unfair and a denial of due process for the SEC and the Federal Circuit to vest Mr. Amato with knowledge & culpability that the initial NASD District 5 tribunal determined he clearly did not have. It is unfair and a denial of due process for the Federal Circuit to vest Mr. Amato with "special knowledge" because he was the office administrative manager and he was responsible to provide for the office electric and telephone bill. The NASD originally charged, and the SEC held in it's own decision that Mr. Amato acted "Solely as a Salesman". It is unfair to fashion a rule of conduct as the case proceeds through the regulatory process. To do so clearly denies one of proper notice. *15 U.S.C. 78o-3 (h)(1)(2); Aberdeen & Rockfish Railroad Company v. U.S., 565 F.2d 327 (5th Cir. 1977); Friendly, Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders, 1969 Duke L.J. 199 (1969).*

The NASD had a fiduciary responsibility to advise Mr. Amato and his principals with Brennan Ross if there was a potential for regulatory concern over any of Mr. Amato's business practices after repeated audits. The NASD and later SEC failure to advise Mr. Amato of any regulatory concern after concluding its previous examinations of all of Brennan Ross Securities books and records, led Mr. Amato to believe that his clientele's Barclays West transactions would be reviewed without any regulatory concerns noted, as were the eleven (11) previous penny stock Initial Offerings that he represented with Brennan Ross. The commissions in all of these transactions were consistent. Furthermore, the term commission is not a synonym for mark-up.

C. Mr. Amato was denied due process by the fact and extent of his punishment.

The purpose of administrative sanctions is not to punish. The purpose is supposed to be remedial. *Beck v. S.E.C., 430 F.2d 673 (6th Cir. 1970).*

Mr. Amato has contended from the inception of these proceedings that the NASD has pursued him to punish him and not for the remedial purposes of administrative sanctions. The belief caused him to request a change in venue, which he contends, was erroneously denied. The history of this case shows Mr. Amato was receiving disparate treatment from the local NASD office from the beginning. As a result, Mr. Amato began complaining in 1989.

The SEC investigated the New Orleans branch office concurrent with the NASD. Neither the investigator nor the SEC administration directed any questions or inquiry regarding excessive mark-ups to Mr. Amato nor any registered representative. Although SEC Examiner, Simmons discovered over fifty (50) transactions which may have had excessive mark-ups, the SEC did not hold Mr. Amato or any registered representative responsible for these excessive mark-ups. Yet, the NASD decided to pursue Mr. Amato regardless. This punitive pursuit can be demonstrated by the way Mr. Amato was treated following the discovery of the alleged excessive mark-ups. Mr. Amato was punished compared to those who were admittedly responsible for setting up the Article III, Section 27 supervision requirements for compliance with fair trading, monitoring pricing procedures, and ensuring compliance with mark-up and commission rules. These other individuals were offered and accepted far more lenient treatment than Mr. Amato.

In order to proceed under Article II, Section II of the NASD's Code of Disciplinary Procedure prior to hearing, the Association prepared and provided all of the respondents an **unsolicited** offer of settlement on or about Sept. 5, 1990. The President, Mr. Bates was offered **no suspension** and Mr. Pittman who was a Brennan Ross Founder, Partner and Head of Trading was offered a **two week suspension.** Together, the partners and founders of the firm were offered and accepted a $15,000.00 concurrent fine ($7,500.00 each). These gentlemen set up the Section 27 supervision requirements for compliance with the fair trading section of the NASD Manual.

General Sales Representatives, Mr. Boehmer, Mr.Block, and Mr. Pellegrin (Pellegrin was also a Registered Securities Principal) were offered a **two (2) day suspension** from Association with any NASD member. These three respondents were also offered a censure, but **no fine**.

Mr. Amato's pre-hearing unsolicited Offer of Settlement prepared by the legal staff of the NASD District 5 New Orleans office imposed sanctions of a censure, a monetary fine in the amount of **$15,000**, and a **Three (3) month suspension** from association with any member of the NASD. (**Appendex - A -14**) After four hearings, the sanctions that have been imposed upon Mr. Amato now include a censure, a monetary fine in the amount of **$20,000,** substantial assessment of **all costs**, **a Four (4) week suspension**, and **re-qualification by examination.** The consequences of such severe sanctions upon a securities salesman are irreparable. (A-14)

It is extremely unlikely that either the stock brokerage firm that Mr. Amato currently represents (Sunpoint Securities) or any other firm will rehire him when sanctions this severe are permanently attached to Mr. Amato's securities regulatory compliance record. Mr. Amato is currently registered to conduct securities transactions in numerous States including Louisiana. It is also extremely unlikely that any State Securities Commission or any Stock Exchange will ever allow Mr. Amato to be registered with a Stock Brokerage Firm even if Mr. Amato fully complies with the terms of the sanctions. (Section 15 (b)(7) of the Securities Exchange Act of 1934, (**A-17**)

The punishment offered to Mr. Amato is totally disproportionate to the claimed wrong. The *Brewer/Gray* disciplinary mark-up complaint originated in the NASD New Orleans District 5 Office several weeks <u>after</u> Mr. Amato's complaint was filed by the same New Orleans NASD office. Mr. Brewer was a <u>registered principal</u> and Mr.Gray was a registered representative. They both represented the New Orleans, Louisiana Office of First Eagle Securities. This office was considered by the regulators to be an Office of Supervisory Jurisdiction. Both Mr. Brewer and Mr. Gray received un-solicited, pre-hearing offers of settlement from the legal staff of the New Orleans NASD which provided censure, **<u>1 day suspension</u>**, and **<u>no fine</u>**. Even in the *Brewer/Gray* case cited by the SEC and decided the day before the Amato SEC decision, both Brewer and Gray only received an after hearing one week suspension and a $5,000 fine.

Prior to May of 1990, there are many examples of penny stock cases involving mark-ups, such as Stuart James, Blinder Robinson, W.T. Gant, Rooney Pace, and even Alstead Dempsey. The many citations presented by the NASD prove that point. No series 7 registered representative has ever been punished for this alleged activity before either the Amato or Brewer complaints were filed by the NASD in 1990.

The Federal Circuit determined that the SEC did not abuse its discretion by imposing these particular sanctions upon Mr. Amato. The Federal Circuit held that " both Brennan Ross' head trader and its president settled the claims against them with the SEC and "The Commission has stated that it will reward such decisions to settle when determining the sanctions to be imposed". (**A-8**) According to this argument, Mr. Amato's sanctions simply increased in the same manner that his sales colleagues increased over the course of the various proceedings as a penalty for not accepting a pre-hearing settlement. This is in fact not the case.

All of Mr. Amato's colleagues were generously extended the opportunity on an unsolicited basis to be rewarded with minimal sanctions if they chose to settle this complaint before incurring the risk of additional liability, legal expense, and increased sanctions that may have been imposed as the result of a formal hearing process. The same right was **never** extended to Mr. Amato.

Mr. Amato received a pre-hearing settlement offer on Sept. 5, 1990 from the NASD that imposed sanctions which were exponentially more severe than the other 5 respondents in the identical complaint put together. (Appendix A-14). Mr. Amato actually testified that he attempted to negotiate a reduced offer of settlement with the legal staff of the New Orleans NASD Office that was comparable to the reasonable pre-hearing offers of settlement provided to his colleagues. The NASD refused to negotiate with Mr. Amato. Consequently, he requested a hearing and a change of venue for hearing outside of the New Orleans area. The change of venue was refused.

Nowhere in securities regulatory history is their any mention of such discriminatory sanctions being imposed upon any other general securities representative who acted solely as a salesman. The SEC and Federal Circuit error concerning the circumstances that

determined Mr. Amato's sanctions is a violation of his right to due process.

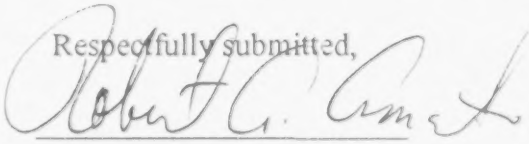
Assuming arguendo that sanctions were appropriate, Mr. Amato was offered and given a disproportionately high sanction. This is the only case in the history of the United States where a registered general securities representative acting solely as a salesman received a prepared un-solicited pre-hearing offer of settlement from the NASD to accept punishment that actually exceeded the un-solicited pre-hearing offers of settlement directed to the jointly charged registered securities principals, and/or partners of the broker dealer for any alleged rule violation of the NASD.

Mr. Amato has had minimal customer complaints out of the many years he has been a registered representative. In a highly speculative field, that is a commendable record. There is no record of any other complaints or allegations of wrong doing in the five years since the NASD and the SEC began their 1989 investigations. Clearly that record pretermits any remedial purpose. See: *Beck, 430 F.2d 673.*

CONCLUSION

Wherefore, the Petitioner prays that a writ of certiorari should be granted. In the event that the Petition is granted, the Petitioner prays that the decisions of the Federal Fifth Circuit of Appeals, The Securities and Exchange Commission and the National Association of Securities Dealers, Inc. be reversed and that the disciplinary action against Robert A. Amato be dismissed, with prejudice, at the SEC's cost.

Respectfully submitted,



Dated:
July 14, 1994

Robert A. Amato, *Pro se**
922 Esplanade Ave.
New Orleans, Louisiana 70116
(504)529-5173

(A)PPENDICES

United States Court of Appeals for the Fifth Circuit

93-4381

ROBERT A. AMATO,
Plaintiff-Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION,
Defendant-Appellee

DECIDED: April 20, 1994

Before HIGGINBOTHAM and DUHÉ, Circuit Judges, and STAGG,[1] District Judge.

STAGG, District Judge.

Securities salesman sought review of order of the Securities and Exchange Commission (SEC), affirming disciplinary action taken against him by National Association of Securities Dealers (NASD). The Court of Appeals, Stagg, District Judge, sitting by designation, held that: (1) liability could be imposed on securities salesman for excessive markups of stock, and (2) SEC's decision to fine salesman $20,000, suspend him for four weeks, and require him to requalify as registered representative as sanction was not gross abuse of discretion.

Affirmed.

1. Exchanges

Liability could be imposed on securities salesman for excessive markups of stock based on violation of National Association

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[1]District Judge of the Western District of Louisiana, sitting by designation

of Securities Dealers (NASD) rules of fair practice, where salesman was in position to know whether markups were excessive due to his position as both buyer and seller of stock.

2. Constitutional Law
Exchanges

Application of National Association of Securities Dealers (NASD) regulations prohibiting excessive markups of stock to securities salesman did not violate ex post facto prohibitions, although stock at issue was sold by broker before Securities and Exchange Commission (SEC) had ruled that registered representative could be held liable for excessive markups in connection with sale of stock; no SEC case precluded possibility that registered representative could be held liable, and NASD rules in effect at time of sales applied to registered representatives. U.S.C.A. Const. Art. 1, §9.

3. Securities Regulation

Securities and Exchange Commissions's (SEC) decision to find securities salesman $20,000, suspend him for four weeks, and require him to requalify as registered representative as sanction for charging excessive markup on stock was not gross abuse of discretion, although sanction received was more severe than sanctions received by his firm's head trader and president; head trader and president settled claims against them with SEC.

4. Securities Regulation

Securities salesman who was sanctioned by Securities and Exchange Commission (SEC) for charging excessive markup in violation of National Association of Securities Dealers (NASD) rules failed to show he was victim of selective prosecution, although he had complained about alleged unfair treatment by local NASD office by writing letters to chairman of NASD and acting directors of SEC.

Petition for Review of an Order of the Securities and Exchange Commission.

Petitioner Amato seeks review of an order of the Securities and Exchange Commission ("SEC") affirming disciplinary action taken against him by the National Association of Securities Dealers, Inc. ("NASD"). Both the SEC and the NASD found that Amato had violated Article III, Sections 1 and 4 of the NASD's Rules of Fair Practice. Finding no error, we affirm.

FACTS.

Robert Amato was a retail salesman and the branch manager of the New Orleans office of Brennan Ross Securities, Inc.[2] Brennan Ross had sold the majority of the initial public offering of the stock in Barclays West, Inc. ("Barclays"),[3] which closed around the beginning of August 1989. During the three-month period following August of 1989, Brennan Ross handled more than ninety percent of all purchases and sales of Barclays stock. Ninety-five percent of the New Orleans office's business consisted of transactions in Barclays stock. The New Orleans office consisted of Amato and three other salesmen.

For each sale, the salesman was given a "wholesale," or "strike" quotation and an "offer" quotation by Brennan Ross' trading department. The salesman was given the discretion to sell the stock for any price between those two numbers, and his commission consisted of the difference between the wholesale price and the retail price. The salesman's salary was computed based on a percentage of his gross commissions.

During this three-month period, Amato purchased 445,650 shares from retail customers in seven transactions on behalf of Brennan Ross. He sold 1,052,550 shares to his retail customers in ninety-nine transactions. Almost eighty percent of his sales transactions were at markups which exceeded twenty percent, and more than sixty percent of the transactions were at markups that exceeded forty percent. Amato's transactions in Barclays yielded gross commissions of

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[2]Brennan Ross is now defunct.

[3]Barclays was a highly speculative penny stock.

$93,999 over the three-month period following August, 1989, producing $65,799 in compensation for him.

NASD filed a complaint against Amato for selling the Barclays stock at an excessive markup, and the District Business Conduct Committee found that he had violated Sections 1 and 4 of the NASD's Rules of Fair Practice. Section 1 requires the observance of "high standards of commercial honor and just and equitable principles of trade." Section 4 requires that prices charged in over-the-counter principal transactions with customers be "fair, taking into consideration all relevant circumstances. . . ." Amato was fined $20,000 and suspended from trading for four weeks. NASD's National Business Conduct Committee affirmed the District Committee, and imposed an additional requirement that Amato requalify as a registered representative by examination after completion of his suspension. The Securities and Exchange Commission upheld this decision.

APPELLANT'S ARGUMENTS.

Amato appeals this decision based on three arguments: 1) The SEC erred in applying Sections 1 and 4 of the NASD Rules of Fair Practice to impose liability on a salesman; 2) The SEC erred in applying an ex post facto interpretation to a rule of conduct; and 3) Amato's due process rights were violated because the punishment he received was excessive, and because he was the target of selective prosecution. This court will address each argument in turn.

A. Do Sections 1 and 4 of the NASD Rules of Fair Practice impose liability on Amato?

[1] Amato argues that sections 1 and 4 of the Rules of Fair Practice promulgated by the NASD do not authorize a finding of liability for a salesman for excessive markups of stock. He argues that Sections 1 and 4 of the Rules of Fair Practice can not be interpreted to impose liability; rather, they are to be construed as aspirational guidelines. As mentioned earlier, Section 1 of Article III of the Rules Provides:

> A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.

NASD Manual, ¶2151. Section 4 of Article III provides:

> In "over-the-counter" transactions . . . if a member buys for his own account from his customer, or sells for his own account to his customer, he shall buy or sell at a price which is fair, taking into consideration all relevant circumstances. . . .

NASD Manual, ¶2154.

Amato further argues that under the Rules of Fair Practice of the NASD Manual, it is the responsibility of the "member" of the NASD, i.e. Brennan Ross, rather than the salesman, to ensure compliance with applicable securities regulations. The NASD rules indeed discuss compliance in terms of the "member's" actions, and require the member to formulate written supervisory procedures in order to ensure compliance with securities regulations. Amato argues that his compliance with Brennan Ross' written procedures exempts him from any liability. He also cites an excerpt from an interpretation by the Board of Governors, in support of his argument that Sections 1 and 4 of the Rules of Fair Practice are merely aspirational:

> The Board stated that it would be impractical and unwise, if not impossible, to define specifically what constitutes a fair spread on each and every transaction because the fairness of a markup can be determined only after considering all of the relevant factors. Under certain conditions a markup in excess of 5 per cent may be justified, but on the other hand, 5 per cent or even a lower rate is by no means always justified.

NASD Manual -- Rules of Fair Practice, Article III, ¶2154, Sec. 4, p. 2055 (1990), Interpretations of the Board of Governors. Amato suggests that the markup rule is a philosophy of business conduct subject to interpretation. He argues that the rule imposed by his case

is untenable, because it would require stockbrokers in satellite offices to question their home office regarding sales prices before each transaction.

However, the ruling of the Commission in Amato's case was not based solely on the wording of Sections 1 and 4. Rather, the Commission found that Amato's "insider" position, in conjunction with his violation of the rule, rendered him liable. The SEC specifically noted that Amato "was intimately involved in the pricing of these securities within parameters set by Brennan Ross' trading department."[4] Further, Amato "had to be aware" that his commissions were a "suspiciously high percentage of the prices paid by customers."[5] The Commission found that Amato's role in this incident was "especially troubling" because of the knowledge he possessed. Because Amato was purchasing the stock from his customers and selling it to them, he was in a position to know the cost to Brennan Ross. The majority of stock brokers are not in a position to have enough information and knowledge to be accountable for excessive commissions. **See generally In re Langley-Howard, Inc., 43 S.E.C. 155, 1966 WL 3140, 1966 SEC LEXIS 186 (1966).** However, due to Amato's position as both buyer and seller of the Barclays stock, he was in possession of such knowledge. The Commission also found that Amato should, "at a minimum, have questioned the large markup between the Firm's 'wholesale' quotes and the prices they were permitted to charge the public."[6] Moreover, the NASD Manual specifically provides that "persons associated with a member shall have the same duties and obligations as a member under these Rules of Fair Practice."[7] Amato's arguments to the contrary are unpersuasive, and we affirm the Commissions's ruling on this issue.

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[4]SEC opinion at p. 4.

[5]SEC opinion at p. 4.

[6]SEC opinion at p. 6.

[7]NASD Manual, Article I, Section 5(a), PP2005 AT 2011 (1993).

B. Whether the Commissions's conclusion that Article III imposed liability of Amato was an impermissible ex post facto application of the regulation?

[2] In its opinion affirming Amato's sanctions, rendered on March 10, 1993, the SEC cited its own opinion in **In re Willis H. Brewer, Jr., Security Exchange Release No. 34-31964, 1993 WL 71024, 1993 SEC LEXIS 499 (Mar. 9, 1993)**. The **Willis Brewer** opinion found a registered representative liable for excessive markups in connection with the sale of stock. Amato argues that the use of this case as precedent is an impermissible ex post facto application of law. He maintains that a registered representative in 1989 can not be expected to anticipate a change of the law in 1993.

This argument is completely without merit. While there are no cases before **Willis Brewer** holding a registered representative liable, none of the SEC cases preclude this possibility. Amato argues that **In re Langley-Howard, Inc., 43 S.E.C. 155, 1966 WL 3140, 1966 SEC LEXIS 186 (1966)** stands for the proposition that salesmen are not liable for excessive markups. However, the reasoning in that case was based on the fact that it was unclear whether the salesmen involved were put on notice that the markups they were charging were unfair. **In re Langley-Howard, Inc., 43 S.E.C. at 162, 1966 WL 3140, 1966 SEC LEXIS at 15**. Implicit in the court's holding is that a registered representative could incur liability if he was on notice that the markup he was charging was excessive.

Secondly, the NASD Rules of Fair Practice were in force in 1989. Therefore, Amato was charged with knowledge of Article I, Section 5(a), which provided that "[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules of Fair Practice." As a registered representative, he was obligated to comply with Sections 1 and 4 of the Rules of Fair Practice.

C. Was Amato denied due process by the fact and extent of his punishment?

Amato argues that the sanction imposed on him was excessive, and that he was the victim of selective prosecution by the SEC.

Essentially, Amato's argument is that the SEC abused its discretion in imposing sanctions on him which were more severe than the sanctions received by the other members of his firm. Brennan Ross' head trader received a two-week suspension for his role in the incident, and he shared a joint fine of $15,000 with Brennan Ross' president. Amato argues that his punishment was clearly excessive in light of the punishment imposed on these two individuals.

[3] We review the Commission's decision to impose this particular sanction on Amato for a gross abuse of discretion. **See Whiteside & Co., Inc. v. SEC, 883 F.2d 7, 10 (5th Cir. 1989); Kane v. SEC, 842 F.2d 194, 201 (8th Cir. 1988); Tager v. SEC, 344 F.2d 5, 9 (2d Cir. 1965).** We can not say that the Commission's decision to find Amato $20,000, suspend him for four weeks, and require him to requalify as a registered representative was a gross abuse of discretion. Furthermore, both Brennan Ross' head trader and its president settled the claims against them with the SEC. The Commission has stated that it will reward such decisions to settle when determining the sanctions to be imposed. **In re Blinder Robinson & Co., 48 S.E.C. 624,m 636 n. 36 (1986), vacated on other grounds, 837 F.2d 1099 (D.C.Cir. 1988).** We conclude that the SEC was well within its discretion in imposing the sanctions on Amato.

[4] Amato also argues that he was singled out to be punished by the SEC in this situation. He states that he received unfair treatment from the local NASD office from the beginning, and subsequently began to complain through letters, initially directed at the local NASD office. After not receiving a response to his inquiries, he ultimately contacted the chairman of the NASD and the acting director of the SEC. Amato provided copies of these letters to Brennan Ross' compliance department. He never received a response to any of his inquiries. The local security regulators voiced displeasure that Mr. Amato had written such letters. Brennan Ross assured the regulators that Mr. Amato would stop writing these letters. Amato was subsequently informed by Brennan Ross that if he wrote another letter of complaint to the regulatory authority, his employment with Brennan Ross would be terminated. Amato contends that he indeed stopped writing the letters, and was consequently punished by the NASD.

In order to establish that he was unfairly prosecuted, Amato must establish that he was singled out for prosecution while others similarly situated were not, and that the action against him was motivated by an arbitrary or unjustifiable consideration, such as race, religion, or the desire to prevent the exercise of a constitutionally-protected right, such as freedom of speech. **See United States v. Collins, 972 F.2d 1385, 1397 (5th Cir. 1992), cert. denied, -- U.S. --, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993); United States v. Hoff, 959 F.2d 731, 735 (8th Cir.), cert denied, -- U.S. --, 113 S.Ct. 162, 121 L.Ed.2d 110 (1992); C. E. Carlson, Inc. v. SEC, 859 F.2d 1429, 1437 (10th Cir. 1988).** Amato has introduced no evidence which comes close to meeting his burden on this issue. Moreover, the Commission submitted a Memorandum which evidences that the NASD had no objection to Mr. Amato's letter-writing practices, as long as they did not interfere with the NASD's conducting its branch office examinations.[8] This evidence falls far below Mr. Amato's burden, and we find his claim to be without merit.

For the foregoing reasons, the judgment of the district court is AFFIRMED

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[8]Record at p. 1338.

B.

Article III, Para. 2177, Sec. 27 (1990) provides in part:

Supervisory System

"(a) Each member shall establish and maintain a system to supervise the activities of each registered representative and associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with the rules of this Association. Final responsibility for proper supervision shall rest with the member. A member's supervisory system shall provide, at a minimum, for the following:

(1) The establishment and maintenance of written procedures as required by paragraphs (b) and (c) of this Section.

(2) The designation, where applicable, of an appropriately registered principal(s) with authority to carry out the supervisory responsibilities of the member for each type of business in which it engages for which registration as a broker-dealer is required. . ."

Written Procedures

"(b)(1) Each member shall establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives and associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with the applicable rules of this Association.

(b)(2) The member's written supervisory procedures shall set forth the supervisory system established by the member pursuant to Section 27(a) above, and shall include the titles, registration status and locations of the required supervisory personnel and the responsibilities of each supervisory person as these relate to the types of business engaged in, applicable securities laws and regulations, and the rules of this Association. The member shall maintain on an internal record the names of all persons who are designated as supervisory personnel and the dates for which such designation is or was effective. Such record shall be preserved by the member for a period of not less than three years, the first two years in an easily accessible place.

(b)(3) A copy of a member's written supervisory procedures, or the relevant portions thereof, shall be kept and maintained in each OSJ and at each location where supervisory activities are conducted on behalf of the member. Each member shall amend its written supervisory procedures as appropriate within a reasonable time after changes occur in applicable securities laws and regulations, including the rules of this Association, and as changes occur in its supervisory system, and each member shall be responsible for communicating amendments through its organization."

C.

According to Art. III, Sec. 27 (f)(1):

"**Office of Supervisory Jurisdiction** means any office of a member at which any one or more of the following functions take place:

(i) order execution and/or market making;

(ii) structuring of public offerings or private placements;

(iii) maintaining custody of customers' funds and/or securities

(iv) final acceptance (approval) of new accounts on behalf of the member;

(v) review and endorsement of customer orders, pursuant to paragraph (d) above

(vi) final approval of advertising or sales literature for use by persons associated with the member, pursuant to Article III, Section 35(b)(1) of the Rules of Fair Practice; or

(vii) responsibility for supervising the activities of persons associated with the member at one or more other branch offices of the member."

D.

BEFORE THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.
DISTRICT BUSINESS CONDUCT COMMITTEE NO. 5

District Business Conduct Committee for District No. 5
COMPLAINANT

v.

Robert A. Amato
Registered General Securities Representative
(CRD No. 1489239)

OFFER OF SETTLEMENT

COMPLAINT No. NEW-770

Prepared by:
Kalju Nekvasil
Regional Counsel
Sept. 5, 1990

I

Individual Respondent Robert A. Amato makes this Offer of Settlement to the District Business Conduct Committee for District No. 5 of the National Association of Securities Dealers, Inc., in respect to the matters alleged by that Committee in Complaint No. NEW-770 filed by it on May 3, 1990.

This Offer of Settlement is submitted solely for the purpose of this proceeding under article II, section 11 of the Association's Code of Procedure, and is made without admitting or denying the allegations contained in Complaint No. NEW-770. It is also submitted upon the condition that the Association shall not institute or entertain, at any time, any further proceeding in respect to the named Respondent based in whole or in part on the factual allegations contained in complaint No. NEW-770 and upon the further condition that it will not be used in this proceeding or in any other proceeding or

otherwise, unless it is accepted by the District Business Conduct committee for district No. 5 and approved by the Board of governors as herein set forth.

II

If this Offer of Settlement is accepted by the Committee and approved by the Board, the Committee may take such action and impose such sanctions as it may deem appropriate, provided, however, that such sanctions shall be consistent with Section III of this Offer, and provided further that the maximum sanctions and costs which may be imposed upon and assessed against the Respondent in this proceeding shall be those set forth in Section III of this Offer.

III

Pursuant to the conditions set forth above, individual Respondent Robert A. Amato will consent to the entry of an Order by the District Business Conduct Committee for District No. 5, disposing of this proceeding in the following manner:

a) Making a finding that individual Respondent Robert A. Amato violated Article III, Sections 1, 2, and 18 of the Association's Rules of Fair Practice, as alleged in the First and Second Causes of Complaint;

b) Stating that individual Respondent Robert A. Amato is consenting to said Order solely for the purpose of this proceeding in respect to the matters set forth in Complaint No. NEW-770 as they pertain to the violations of Article III, Sections 1, 4, and 18 of the Association's rules of Fair Practice, and not for the purpose of any other proceeding or action, and without admitting or denying the allegations contained in complaint No. NEW-770; and

c) Imposing sanctions of a censure, a monetary fine in the amount of **$15,000.00**, and **a three (3) month suspension** of individual Respondent Robert A. Amato from association with any member of the Association in any capacity, said suspension to commence on a date set by the Association.

IV

For the purpose of this Offer and only after its acceptance by the Committee and approval by the board, subject to the provisions of

Sections I, II, and III hereof, individual Respondent Robert A. Amato hereby waives his right to:

a) A hearing in this proceeding before any District Business Conduct Committee of the association and before a Sub-Committee of the Board of Governors, pursuant to Article II, Section 4 and article III, Sections 1 and 2 of the Association's Code of Procedure;

b) Review by the Securities and Exchange Commission pursuant to Section 19(d) of the Securities Exchange Act of 1934 and Rule 19d thereunder;

c) Judicial review by any court of any phase or aspect of this proceeding before the Association; and

d) Challenge in any other manner the validity of the Order issued if the Offer of Settlement is accepted.

V

Individual Respondent Robert A. Amato states that no promise of any kind or nature has been made to induce him to make this Offer and to agree and consent as set forth above, and that this offer is a voluntary act on his part.

_____ _____

Robert A. Amato Date
Registered General Securities
Representative

WAIVER OF PROCEDURAL RIGHTS
under the
SECURITIES EXCHANGE ACT OF 1934
and the
ASSOCIATION'S CODE OF PROCEDURE

OFFER OF SETTLEMENT

I have on this date received from Kalju Nekvasil, Regional Counsel, an explanation of my rights under the Association's Code of Procedure including, but not limited to, my right to defend against the allegations specified in Complaint No. NEW-770 in a hearing before a District Business Conduct Committee, to be represented by counsel, to have a record kept of such proceeding, and to have a written determination from the District Business Conduct Committee of its findings, the specific rules violated, and the penalties imposed. I have further been advised that I have a right to appeal such determination to the Board of Governors of the association pursuant to which I have a right to appeal such Board of governor's decision to the Securities and Exchange Commission and thereafter to the U.S. Court of Appeals.

I know and understand my foregoing rights, and hereby voluntarily waive such and state that no promise, threat, or inducement has been made in connection with this Waiver or the Offer of Settlement.

I hereby certify that the foregoing statement has been reviewed by me and I was given full opportunity to read it and to ask questions about it and the consequences of the sanctions to which i consent.

_____ _____

Robert A. Amato Date
Registered General Securities
Representative

E.

Addendum to Unsolicited Pre-hearing Offer of Settlement from NASD dated Sept. 5, 1990:

EFFECT OF A SUSPENSION, REVOCATION, BAR, OR MONETARY SANCTION OF $10,000.00 OR MORE

I am fully aware and understand that if I consent to a sanction of a suspension, revocation, or bar, I may not be associated with any capacity, including clerical or ministerial functions, during the period of the suspension or after the effectiveness of the revocation or bar. If I am suspended, no member or person associated with a member may pay me or credit me, directly or indirectly, any salary, commission, profit or other remuneration during the period of suspension.

I am further fully aware that if I consent to a sanction of a suspension, revocation, or bar, I may be deemed to be not qualified, pursuant to Section 15(b)(7) of the Securities Exchange Act of 1934. In addition, I am aware that a suspension or bar may, in some instances, serve as a basis for state or other self-regulatory agency action and the imposition of sanctions in connection therewith. I am aware that the Association has no control over the actions of such other agencies.

Finally, I am aware that the Association will report to the membership and to the press any order of suspension, revocation, or bar of myself, or the imposition of a monetary sanction of $10,000.00 or more on me; that such report will describe the violations, and the sanctions imposed; and further, that such account may be reported to the news media. I am aware that this report may also identify the member firm with whom I was associated at the time the violations occurred if such identification is deemed by the association to be in the public interest.

I certify that the foregoing statement has been reviewed with me by Kalju Nekvasil, Regional Counsel, and that I was given full opportunity to read it and ask questions about it.

_____ _____

Robert A. Amato Date

Registered General Securities Rep.

Supreme Court, U.S.
FILED
SEP 16 1994
OFFICE OF THE CLERK

No. 94-105

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT A. AMATO, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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KATHARINE B. GRESHAM
Assistant General Counsel

CATHERINE A. BRODERICK
Counsel
Securities and Exchange Commission
Washington, D.C. 20549

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the rules of the National Association of Securities Dealers, Inc., permit imposition of liability on a securities salesman (as distinguished from a securities firm) for excessive markups on sales of stock when the salesman was on notice at the time of the sales that the markups he was charging his customers were excessive.

2. Whether the Securities and Exchange Commission's order affirming petitioner's accountability for the excessive markups conflicts with established Commission precedent.

3. Whether the particular sanctions imposed on petitioner are so excessive as to constitute an abuse of discretion.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	12
Appendix	1a

TABLE OF AUTHORITIES

Cases:

William E. Brandow, In re, 46 S.E.C. 1113 (1977)	9
Butz v. *Glover Livestock Commission Co.*, 411 U.S. 182 (1973)	11, 12
Charles L. Campbell, In re, 49 S.E.C. 1047 (1989)	9
Langley-Howard, Inc., In re, 43 S.E.C. 155 (1966)	6, 10
Orkin v. *SEC*, No. 93-4415, 1994 WL 461848 (11th Cir. Sept. 13, 1994)	9
Whiteside & Co., In re, 49 S.E.C. 963 (1988), aff'd, 883 F.2d 7 (5th Cir. 1989)	9

Statutes:

Securities Exchange Act of 1934, 15 U.S.C. *et seq.*:	
§ 15A, 15 U.S.C. 78*o*-3 (1988 & Supp. IV 1992)	2
§ 19, 15 U.S.C. 78s	2
§ 19(d)(2), 15 U.S.C. 78s(d)(2)	2-3
§ 19(e)(1), 15 U.S.C. 78s(e)(1)	2-3
§ 19(e)(2), 15 U.S.C. 78s(e)(2)	12
§ 25(a), 15 U.S.C. 78y	3

Miscellaneous:

Willis H. Brewer, Jr., In re, Exchange Act Release No. 31,964, 53 SEC Docket 2363 (Mar. 9, 1993)	10, 11
Eric M. Diehm, In re, Exchange Act Release No. 33,478, 55 SEC Docket 2830 (Jan. 14, 1994)	9
NASD Manual (1994)	2, 5, 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-105

ROBERT A. AMATO, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 18 F.3d 1281. The decision of the Securities and Exchange Commission (App., *infra*, 1a-11a)[1] is reported at 53 SEC Docket 1686.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1994. The petition for a writ of certiorari was filed on July 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The decision of the Securities and Exchange Commission was not included in petitioner's appendix and is therefore reproduced in an appendix to this brief.

STATEMENT

Petitioner was a retail securities salesman and branch manager of the New Orleans office of the brokerage firm Brennan Ross Securities, Inc. (Brennan Ross), a member of the National Association of Securities Dealers, Inc. (the NASD). The court of appeals affirmed an order of the Securities and Exchange Commission sustaining disciplinary action taken against petitioner by the NASD for selling securities to cus-tomers at unfair prices in violation of Article III, Sections 1 and 4 of the NASD's Rules of Fair Practice.[2] Pet. App. A3.

1. The NASD is a national securities association registered with the Commission. As such, the NASD is responsible for regulating its member firms and persons associated with members, subject to comprehensive oversight by the Commission. See Sections 15A and 19 of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78*o*-3, 78s (1988 & Supp. IV 1992). Disciplinary action taken by the NASD is subject to review by the Commission. Exchange Act Sections 19(d)(2) and (e)(1), 15 U.S.C. 78s(d)(2) and (e)(1). On review, the Commission

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[2] Article III, Section 1 provides:

> A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.

NASD Manual ¶ 2151, at 2014 (1994).

Article III, Section 4 provides in pertinent part:

> In "over-the-counter" transactions * * * if a member buys for his own account from his customer, or sells for his own account to his customer, he shall buy or sell at a price which is fair, taking into consideration all relevant circumstances * * *.

NASD Manual ¶ 2154, at 2049 (1994).

considers the record *de novo* and makes its own findings on whether the conduct in question occurred and whether it violated the NASD's rules or the federal securities laws and rules. Exchange Act Section 19(e)(1), 15 U.S.C. 78s(e)(1). The Commission's findings and order are then subject to judicial review. Exchange Act Section 25(a), 15 U.S.C. 78y(a).

2. This case involves excessive markups charged by petitioner on sales of Barclays West, Inc. common stock to petitioner's retail customers. The Brennan Ross firm sold the bulk of the initial public offering of Barclays West stock in August 1989 (prior to the markup violations), with petitioner himself placing more than half of the units sold. Pet. App. A3; App., *infra*, 4a. During the first three months of trading in the secondary market, Brennan Ross handled more than 90% of all purchases and sales of Barclays West nationwide. Pet. App. A3. Petitioner's trading in Barclays West, along with that of the other three salesmen in the New Orleans office, accounted for 80% of all trading in the stock by the firm and 95% of the branch office's total business during those three months. *Ibid.*; App., *infra*, 3a. Petitioner personally handled most of those transactions. App., *infra*, 4a.

For each sales transaction, petitioner and the other salesmen were given a wholesale quotation and a retail quotation by the Brennan Ross trading department and could sell the stock to their customers at any price in the range between the two. Pet. App. A3. The gross commission to the firm on a transaction was the difference between the wholesale quotation and the price charged to the customer; the salesman's compensation was a percentage of that gross commission (in petitioner's case, 70%). *Ibid.*; SEC R. 1404. Although the salesmen were permitted to charge customers less than

the retail quotation announced by the trading desk, thereby giving themselves a lower commission, petitioner always charged his customers the full quoted retail price. Pet. App. A3; Pet. 8.

The level of markup on a securities transaction is computed by the NASD on the basis of the prevailing market price of the security. App., *infra*, 3a. The prevailing market price generally means the price at which dealers trade the security on the inter-dealer market. *Ibid.* However, where, as here, a dealer dominates and controls the market for a particular security, the Commission considers the prevailing market price to be the price the dealer itself has paid in contemporaneous transactions. *Ibid.* Under those circumstances, the markup is the amount by which the retail price to a customer exceeds the firm's contemporaneous cost. *Ibid.*

For many of the Barclays West transactions, petitioner was aware of Brennan Ross's contemporaneous cost because he was purchasing the stock from his customers at the same time he was selling the stock to other customers. Pet. App. A6. For instance, on one day he purchased a block of 160,000 shares at 19 3/4 cents per share from a customer and that same day sold more than 460,000 shares to other customers at prices ranging from 25 cents per share to 37 1/2 cents per share, reflecting markups of 20% to 80%. See SEC R. 890-892. The markups on the 95 transactions at issue in this case ranged from 14% to more than 80%—all well in excess of the NASD's 5% guideline on markups for such securities.[3] See *id.* at 890-895.

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[3] The NASD's Mark-Up Policy, an Interpretation under Article III, Sections 1 and 4, provides in pertinent part:

Between August and October 1989, petitioner purchased 445,650 shares of Barclays West stock from his customers and sold 1,052,550 shares. Pet. App. A3. The transactions yielded gross commissions of $93,999, producing $65,799 in compensation for petitioner. *Id.* at A4.

3. a. The NASD's District Business Conduct Committee for District No. 5 charged petitioner with violating Article III, Sections 1 and 4 of the NASD's Rules of Fair Practice by selling securities to customers at unfair prices. A hearing panel found petitioner responsible for charging excessive markups and censured him, fined him $20,000, and suspended him for four weeks from association in any capacity with any NASD member. SEC R. 1568-1579. On review, the NASD's National Business Conduct Committee affirmed the hearing panel's determination and sanctions, and it imposed, as an additional penalty, a requirement that petitioner requalify as a registered representative[4] by examination following completion of his suspension. *Id.* at 1792-1806.

> It shall be deemed conduct inconsistent with just and equitable principles of trade for a member to enter into any transaction with a customer in any security at any price not reasonably related to the current market price of the security or to charge a commission which is not reasonable.

NASD Manual ¶ 2154, at 2051 (1994). The NASD has adopted 5% as a guideline in analyzing excessive markups in equity securities transactions. *Id.* at 2050-2051.

[4] Under the NASD's rules, securities salesmen like petitioner are "registered representatives" of member firms. Art. IV, Sections 1 and 2 of the NASD's By-Laws, *NASD Manual* ¶¶ 1151-1152, at 1201 (1994); Pt. III of Schedule C to the NASD's By-Laws, *NASD Manual* ¶ 1785, at 1542-1545 (1994).

b. Petitioner applied to the Commission for review of the NASD's decision. Based upon an independent review of the record, the Commission sustained the NASD's disciplinary action. App., *infra*, 7a-8a. The Commission rejected petitioner's argument that, as a registered representative (as opposed to the firm itself or its principals), he should not have been held accountable for the excessive mark-ups. *Id.* at 7a, 8a n.18. The Commission found that because petitioner controlled the amount of his commissions (and thereby the final retail price of the stock) within the parameters set by the firm's trading department, he had to be aware that the commissions represented a suspiciously high percentage of the prices paid by customers—usually 25% or more of the retail price. *Id.* at 5a-6a. In addition, the Commission noted that petitioner was directly aware of the firm's contemporaneous cost on many occasions, having acquired about 25% of the firm's total inventory of Barclays West stock from his own retail customers. *Id.* at 7a. On the basis of these and other record facts, the Commission found that petitioner was accountable for the excessive markups. *Ibid.*

c. The court of appeals affirmed. Pet. App. A1-A9. The court found that petitioner was in a position to know that his sales entailed excessive markups, based upon the high commissions set on his own sales transactions and his direct knowledge of the price paid by the firm in its purchases from his customers. *Id.* at A6. It rejected petitioner's argument that holding him liable represented a departure from a prior Commission decision, *In re Langley-Howard, Inc.*, 43 S.E.C. 155 (1966), in which the Commission had declined to hold individual salesmen responsible for excessive markups. Pet. App. A7. Implicit in the *Langley-Howard* decision, the court noted, was the proposition that salesmen may be held

accountable for pricing violations if they are on notice that unfair prices are being charged. Pet. App. A7. It similarly rejected petitioner's objection to the sanctions, finding that the Commission had acted well within its broad discretion. *Id.* at A8.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioner's arguments to the contrary are fact-bound and entirely without merit. Further review of this case is therefore unwarranted.

1. The court of appeals properly held petitioner liable for selling securities to his customers at unfair prices. Petitioner does not dispute the Commission's finding that his customers were charged excessive markups. Rather, he contends (Pet. 13-21) that he should not be held accountable because under the NASD's rules and the firm's internal procedures, Brennan Ross's trading department and its principals were responsible for supervising the salesmen and maintaining prices in compliance with the NASD guidelines. He was, he says, merely a registered representative, charging his customers prices set by the firm.

There is no merit to petitioner's contention that the supervisory responsibilities imposed on a firm and its principals by the NASD shielded him from his own responsibility for charging his customers fair prices. Nor did Brennan Ross's decision to place responsibility on its trading department for establishing the markup range relieve petitioner of his responsibility to sell to his customers at a fair price. To the contrary, the NASD Rules of Fair Practice expressly provide that a registered salesman, as a person associated with a member firm, has a duty concurrent with that of his firm

to conduct his activities in accordance with the NASD rules.[5]

A securities salesman who is in a position to know that the prices he is charging are unfair is thus properly held accountable for violating the NASD rules prohibiting that practice. In this case, petitioner had the information needed to call into question the fairness of the prices he charged. He knew from his own sales activity and that of the other salesmen in his office that Brennan Ross dominated and controlled the market in Barclays West stock.[6] He had direct knowledge of the firm's contemporaneous cost because of the purchases he made directly from his customers. He knew the prices his customers were being charged when they bought Barclays West stock from him. He also knew what his commission was on each transaction and could see that the commission represented a substantial portion of the

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[5] Article I, Section 5(a) of the NASD Rules of Fair Practice provides in pertinent part:

> Persons associated with a member shall have the same duties and obligations as a member under these Rules of Fair Practice.

NASD Manual ¶ 2005, at 2011 (1994).

[6] Petitioner erroneously contends (Pet. 25-26) that the Commission improperly ascribed special knowledge to him of Brennan Ross's markup and pricing procedures because he was a branch manager. The Commission acknowledged that petitioner was liable only as a salesman. App., *infra*, 2a n.4. The Commission did not hold him liable as branch manager for the unfair prices charged for Barclays West stock, recognizing that he did not have a supervisory role with respect to Brennan Ross's pricing determinations or operations in general. The Commission did take into account, however, that as manager of the New Orleans branch office, petitioner was in a position to observe the office's sales activity in Barclays West stock. See App., *infra*, 7a.

price charged to his customers. Such circumstances put petitioner on notice that his customers were being charged excessive markups, and he was rightly held accountable. See *Orkin* v. *SEC*, No. 93-4415, 1994 WL 461848, at *9 (11th Cir. Sept. 13, 1994) (expressly adopting holding of Fifth Circuit in this case that a salesman with knowledge of excessive markups may be held liable for violating Sections 1 and 4 of the NASD Rules).[7]

2. Holding petitioner accountable does not represent an *ex post facto* change in the law, as petitioner contends (Pet. 21-24). The NASD's prohibition against excessive markups has always applied to salesmen as a matter of law by virtue of Article I, Section 5(a) of the Rules of Fair Practice.[8] And, notwithstanding petitioner's con-

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[7] Petitioner errs in contending (Pet. 24-26) that the Commission and the court of appeals surreptitiously converted the charge against him from violation of the markup rule to violation of the rule against unreasonable and discriminatory commissions (Article III, Section 3 of the Rules of Fair Practice). Petitioner was charged with and was found to have committed violations of the NASD's requirement that customers be charged fair prices. The high commissions petitioner charged were cited not as an independent violation, but rather as one factor that ought to have alerted him to the fact that the Barclays West markups were too high.

[8] Contrary to petitioner's apparent understanding, associated persons have been held liable in other cases under Article I, Section 5(a) for violation of NASD rules addressed to member firms. See, *e.g.*, *In re Eric M. Diehm*, Securities Exchange Act Release No. 33,478, 55 SEC Docket 2830, 2832-2833 n.8 (Jan. 14, 1994) (registered representative); *In re Charles L. Campbell*, 49 S.E.C. 1047, 1051 n.12 (1989) (principal); *In re Whiteside & Co.*, 49 S.E.C. 963, 965 n.7 (1988) (principal), aff'd, 883 F.2d 7 (5th Cir. 1989); *In re William E. Brandow*, 46 S.E.C. 1113, 1114 n.3 (1977) (registered representative).

trary view, his treatment in this case is fully consistent with Commission precedent.

Implicit in the Commission's decision in *In re Langley-Howard, Inc.*, 43 S.E.C. 155 (1966), not to hold the subject salesmen accountable for pricing violations was the Commission's recognition that salesmen may indeed be held responsible in appropriate circumstances. In *Langley-Howard*, the Commission reversed the NASD's finding that the salesmen had sold securities at unfair prices because it was "not clear whether the compensation received by the member's salesmen should have put them on notice that the mark-ups were or might be unfair." *Id.* at 162. In reaching that conclusion, the Commission noted that the salesmen did not, as a rule, receive commissions on their sales, but were paid a percentage of the firm's monthly gross profit. *Ibid.* While the salesmen did receive a fixed commission for selling a small block of stock the firm had acquired at a bargain price, the salesmen had no reason to know that the purchase price was other than the published inter-dealer quotation. *Ibid.*

In contrast, petitioner had personal knowledge of Brennan Ross's cost because of his own contemporaneous purchases from customers. Moreover, he set (and thus knew) his commission within the broad bounds established by the firm's trading department. Here, because petitioner knew that his customers were paying excessive markups on their purchases of the Barclays West stock, holding him accountable is entirely consistent with the holding of *Langley-Howard*.[9]

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[9] Contrary to petitioner's interpretation, the Commission's decision in *In re Willis H. Brewer, Jr.*, Exchange Act Release No. 31964, 53 SEC Docket 2363 (Mar. 9, 1993), is also consistent with *Langley-Howard*. Petitioner asserts (Pet. 21) that the Commission

3. Petitioner has not shown, and cannot on this record show, that the Commission abused its broad discretion in approving the sanctions imposed upon him. Those sanctions properly reflect the nature and extent of his misconduct. Despite strong indications of unfair pricing, petitioner substantially overcharged his customers in numerous transactions over a three-month period, generating gross commissions of almost $94,000 and compensation for himself of more than $65,000.

Nor can petitioner legitimately complain that his sanctions are disproportionate to those received by others at Brennan Ross. Petitioner has no legal right to the same pre-hearing settlement offers or the same ultimate sanctions as other parties in this case. Appropriate remedial action depends upon the facts and circumstances of each case and each party, and cannot be determined merely by comparison with the action taken in other cases or against other parties. *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182, 187 (1973). Here, petitioner was personally responsible for most of Brennan Ross's trading in Barclays West stock, and the Commission accordingly concluded that peti-tioner's conduct "was particularly egregious, justifying more severe sanctions." App., *infra*, 10a n.23. The censure, fine, suspension and re-examination require-ment were commensurate with petitioner's level of culpability and

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used *Brewer* to provide a precedent in this case for ignoring or overturning *Langley-Howard*. Although the Commission noted, parenthetically, that *Langley-Howard* might not be decided the same way if it were considered today, it carefully distinguished the facts in *Brewer* (as it later did the facts of this case) based on the salesmen's position of knowledge with respect to the excessive markups. 53 SEC Docket at 2368 & n. 19.

were neither excessive nor oppressive. See Exchange Act Section 19(e)(2), 15 U.S.C. 78s(e)(2).[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

SIMON M. LORNE
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Counsel
Securities and Exchange Commission

SEPTEMBER 1994

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[10] Moreover, even if petitioner's sanctions were deemed disproportionate to those received by the others, "mere unevenness in the application of the sanction does not render its application in a particular case 'unwarranted in law.'" *Butz*, 411 U.S. at 188.

APPENDIX

IN THE MATTER OF THE APPLICATIONS OF
ROBERT A. AMATO
922 Esplanade Avenue
New Orleans, Louisiana
WILLIAM C. BOEHMER, JR.
44 Pelham Drive
Metairie, Louisiana
AND
CHARLES D. BLOCK, JR.
1221 Magazine Street
New Orleans, Louisiana
FOR REVIEW OF DISCIPLINARY ACTION
TAKEN BY THE NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC.
Admin. Proc. File No. 3-7598
March 10, 1993

OPINION OF THE COMMISSION

I.

Robert A. Amato, William C. Boehmer, Jr., and Charles D. Block, Jr. (together with Amato and Boehmer, "Applicants") who were former salesmen in the New Orleans branch office of Brennan Ross Securities, Inc. ("Brennan Ross" or the "Firm"), formerly a member of the National Association of Securities Dealers, Inc. (the "NASD"), appeal from

an NASD disciplinary action.[1] The NASD found that Applicants engaged in transactions with customers at unfair prices in violation of Article III, Sections 1 and 4 of the NASD's Rules of Fair Practice.[2] The NASD censured Applicants; fined Amato $20,000 and suspended him in all capacities for four weeks; fined Boehmer and Block $5,000 each and suspended each of them in all capacities for one week; and required each of the Applicants to requalify by examination as a registered representative following completion of his suspension.[3] Our findings are based on an independent review of the record.

II.

From August through October 1989, Boehmer, Block, and Amato (who was the manager of the New Orleans office[4]) solicited transactions with customers in the common stock of Barclays West, Inc. ("Barclays") at unfair prices. Barclays was a so-

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[1] Brennan Ross was expelled from membership in early 1991 for failure to pay NASD fines and costs. The Firm along with its president, Barry Bates, and its head trader, Michael D. Pittman, also respondents in this matter, entered into a settlement of these proceedings.

[2] Section 1 requires the observance of "high standards of commercial honor and just and equitable principles of trade." Section 4 requires that prices charged in over-the-counter principal transactions with customers be "fair, taking into consideration all relevant circumstances. . . ."

[3] The NASD also assessed costs.

[4] Amato contends that he was merely an "administrative branch manager," and did not have supervisory responsibilities. He also claims that the NASD was bound by a finding of its District Business Conduct Committee that all of the Applicants "acted solely as salesmen" in this matter. For purposes of this opinion, we accept Amato's assertions.

called "blank check" or "blind pool" offering,[5] selling for less than a dollar. Brennan Ross had been an underwriter of Barclays' initial public offering, which closed on August 2, 1989. Between August and October, Brennan Ross effected 91.07 percent of all purchases and 90.57 percent of all sales of Barclays stock. The New Orleans office was responsible for roughly 80 percent of the Barclays transactions effected by the Firm.

The NASD found that Brennan Ross dominated and controlled the market. Therefore, the NASD calculated the Firm's markups on the basis of the Firm's contemporaneous cost, resulting in markups ranging from 10 to 80 percent.

We agree that Brennan Ross dominated and controlled the market for Barclays and that the Firm's contemporaneous costs are the appropriate basis on which to compute these markups. As we have repeatedly held, markups are computed on the basis of the prevailing market price.[6] Generally, the prevailing market price means the price at which dealers trade with each other, *i.e.*, the current inter-dealer market. However, where, as here, a dealer dominates and controls the market for a particular security, the best evidence of the prevailing market price is the price that the dealer pays other dealers in contemporaneous transactions, rather than the price it charges in inter-dealer sale transactions or

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[5] Its prospectus described Barclays as "a development stage enterprise formed . . . to evaluate, structure and complete a merger with, or acquisition of, prospects consisting of private companies, partnerships or sole proprietorships."

[6] *Alstead, Dempsey & Company, Incorporated*, 47 S.E.C. 1034, 1035 (1984).

validated ask quotations.[7] If there are no contemporaneous purchases from other dealers, purchases from retail customers may be used to determine prevailing market price, subject to an imputed markdown being added to the purchase price. The use of an imputed markdown reflects that the price at which the dealer purchases a security from its customer will generally be less than the amount that the dealer would have paid for that security in the inter-dealer market.[8]

Our review of the record supports the NASD's findings—which are basically undisputed—of markups exceeding five percent[9] in the following number of transactions: Amato: 95; Boehmer: 26; and Block: 34.[10]

III.

Applicants do not dispute that the prices charged by the Firm were excessive. However, Applicants argue that they cannot be held responsible for Brennan Ross' markups of Barclays stock. Applicants concede that they had some discretion over retail prices as a means of setting their own commissions. They claim, however, that they relied on Brennan Ross' trading department to ensure that

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[7] *Meyer Blinder, et al.*, Securities Exchange Act Rel. No. 31095 (August 26, 1992), 52 SEC Docket 1436, 1441, *appeal docketed sub nom. Gordon* v. *SEC*, No. 92-11554 (D.C.Cir.) (appeal pending).

[8] *Meyer Blinder, supra*, at 1443. In all but a few instances, Brennan Ross acquired Barclays stock from its retail customers.

[9] Indeed, the markups generally were well in excess of ten percent.

[10] The NASD found that the Applicants had charged excessive markups in, respectively, 96, 27 and 38 transactions.

those prices were fair because the Firm's procedures manual assigned "responsibility [to] the Trading Department to point out any mark-ups that seem[ed] excessive." They contend that it is inconsistent for the NASD to require firms to implement such procedures and then hold representatives liable for following them. [11]

These contentions are unpersuasive. Each of the Applicants was intimately involved in the pricing of these securities within parameters set by Brennan Ross' trading department. For each transaction, the trading department would provide a "wholesale" or "strike" quotation and an ask quotation. The salesman could effect sales at any price between the wholesale and the ask quotations.[12] The salesman's gross commission was the difference between the wholesale quotation and the retail price charged, and his compensation was based upon a fixed percentage of his gross commissions.

The Applicants controlled the amount of their commissions, and had to be aware that they represented a suspiciously high percentage of the prices paid by customers.[13] Most of their commissions on

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[11] Boehmer and Block also claim to have relied on Amato, as branch manager, to ensure their compliance with NASD rules.

[12] Prices could exceed the ask quotation only when necessary to generate the Firm's minimum commission of $60 per trade.

[13] Applicants note that we declined to hold individual salesmen responsible for unfair pricing in *Langley-Howard, Inc.*, 43 S.E.C. 155, 162 (1966). In *Langley-Howard*, the salesmen received such large commissions that the NASD concluded the salesmen should have been on notice that the prices charged by the firm were unfair. We disagreed. In that case, we found that the salesmen generally did not receive fixed commissions on their sales, but instead were paid a percentage of their firm's monthly gross profits on the stocks

individual sales were approximately 25 percent or more of the retail price paid by customers in the case of Amato, and roughly 20 percent or more in the case of Boehmer and Block.[14] Moreover, even if we were to measure the markups from the Firm's "wholesale" quotations (which the salesmen noted on many of their order tickets),[15] the resulting markups were often well in excess of ten percent.[16] Thus,

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in question. With respect, however, to a small block of shares that *Langley-Howard* had bought at a bargain price, the firm promised the salesmen a specified commission. Under those circumstances, we held that the commissions on transactions relating to that block would not necessarily have put the salesmen on notice of improper pricing. We did not state in *Langley-Howard* that high commissions could never alert a salesmen to the possibility of unfair markups. Here, the salesmen routinely received (and indeed set) very large commissions. We have also recently noted that, in our view, the *Langley-Howard* case would not necessarily be decided in the same manner if we were to consider it today. *Willis H. Brewer, Jr.*, Securities Exchange Act Rel. No. 31964 (March 8, 1993) — SEC Docket ——.

[14] Amato also received an override of 20 percent on business generated by the New Orleans office.

[15] Copies of order tickets placed in the record are not entirely legible, making it impossible to know in several instances the Firm's wholesale quotations.

[16] Applicants further argue that, as mere salesmen in a branch office, they lacked access to the information needed to evaluate the fairness of the markups. They note that an NASD examiner testified that the examiner was unable to complete his analysis of the pricing at issue by reviewing only records on hand at the New Orleans office. The examiner also had to review records maintained at Brennan Ross' headquarters and to consult other firms that traded in Barclays.

The fact that an NASD examiner employed sources other than those present at the New Orleans office—and thus not readily available to the salesmen—is clearly not determinative. Applicants' liability is premised on a finding that they should,

regardless of whether Applicants actually knew Brennan Ross' contemporaneous costs, they should, at a minimum, have questioned the large markup between the Firm's "wholesale" quotes and the prices they were permitted to charge the public.

Finally, we observe that, although the record supports the NASD's findings of violations against all three of the Applicants, it paints an especially troubling picture of Amato's role in this matter. It is clear that on many occasions Amato knew the Firm's contemporaneous cost because he, on the Firm's behalf, acquired roughly a quarter of Brennan Ross' inventory of Barclays stock from retail customers. Amato also had to know that Brennan Ross dominated and controlled the Barclays market. He personally had sold over one-half the total number of units issued during the Barclays initial public offering. Then, when secondary trading commenced, the New Orleans office effected roughly 80 percent of all Barclays transactions executed by Brennan Ross. As mentioned, Amato managed that office and was responsible for the bulk of those transactions.

Under the circumstances, we have no hesitation in holding the Applicants responsible for these markups. Their efforts to blame the failings of others at the Firm for their own misconduct are, in our view, wholly unpersuasive.[17] We therefore sustain the

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at the least, have questioned the fairness of the prices charged and failed to do so.

[17] It seems clear to us that the placing, by management, of primary compliance responsibility with respect to certain requirements with one component of a firm (here, the trading department) does not relieve other components of that firm (such as the sales force) of their responsibility. Thus, we have held before that a failure to supervise salesmen does not in any way insulate those salesmen from liability under the antifraud

NASD's findings that Applicants violated Sections 1 and 4 of Article III of the Rules of Fair Practice.[18]

IV.

Amato claims misconduct on the part of the NASD staff.[19] Amato charges that this NASD disciplinary action was brought, and other forms of harassment—including the mailing of questionnaires to over 200 of his clients—were instituted, as a means of penalizing him for a complaint he filed with NASD headquarters about the conduct of regional NASD personnel. He also presents letters from the NASD to his then-current employer informing the employer that he had been suspended as a result of disciplinary proceedings. Amato contends that the NASD should not have publicized the fact of his sanction pending his appeal. Additionally, Amato submitted a copy of an NASD "disclosure summary," released through the NASD's public disclosure program, which inaccurately reported that he had committed fraud and which failed to note that Amato was appealing. The

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provisions of the securities laws. *Donald T. Sheldon*, Securities Exchange Act Rel. No. 31475 (November 18, 1992), 52 SEC Docket 3826.

[18] Amato's contention that the NASD rules do not apply to salesmen is wrong. *See* Article I, Section 5(a) of the Rules of Fair Practice ("Persons associated with a member shall have the same duties and obligations as a member under these Rules of Fair Practice.").

[19] These allegations are contained in a personal statement accompanying his brief. We hereby admit this statement and two reply briefs filed by Amato, along with attachments thereto, as additions to the record.

NASD subsequently corrected the errors in that summary.[20]

We do not believe Amato has shown that the NASD acted improperly. The NASD's action in publicizing the results of its proceedings against Amato was consistent with longstanding policy, and is no evidence of NASD hostility toward him. As we previously have observed, "in accordance with a resolution of its Board of Governors, the NASD regularly publicizes the sanctions it imposes if they are of a severe nature, whether or not those sanctions are appealed to this Commission."[21] While it is unfortunate that the initial reports contained errors, the NASD made prompt corrections when the misstatements were brought to its attention. Thus in our view, Amato has failed to establish that any

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[20] Amato also notes that the NASD's general counsel acknowledged by letter that Amato received "some incorrect or incomplete information" from NASD personnel in connection with the handling of an arbitration matter. Neither the nature of this information nor the subject matter of the arbitration proceeding (which appears to have been a claim against Amato that was dismissed) is clear from the record. We therefore are unable to find any prejudice to Amato.

Additionally, Amato makes vague allegations that the local NASD staff is being investigated by the F.B.I. and this Commission, and that the NASD's regional counsel "suddenly" left that office following the NASD's consideration of the appeal of its District Business Conduct Committee's decision in this case. Amato, however, has provided virtually no support for these charges, nor shown how they might be relevant to our consideration of his appeal. We therefore reject his request that we direct the NASD to provide him with any "evidence" it has on these matters. *See, e.g., International Research & Management Corp.*, 46 S.E.C. 1167, 1172 (1978).

[21] *David D. Esco, Jr.*, 46 S.E.C. 1205, 1208 (1978). *See also DWS Securities Corporation*, Admin. Proc. File No. 3-7703, *Order Denying Stay*, (May 1, 1992).

errors in reporting were part of a concerted effort to harm him.

Nor do we find anything improper about the NASD's use of a customer questionnaire. Such practice is a necessary and appropriate means of gathering information on members' sales practices. It thereby furthers the NASD's regulatory objectives. We also note that the NASD sought to minimize any adverse effect from the questionnaire by stating in its cover letter that "[t] his is a routine request and should not be taken as an indication of any wrongdoing on the part of the firm or the representative." In any event, Amato's complaints are irrelevant to the issue of his liability for these markups.[22]

The Applicants contend that the sanctions are excessive. We disagree. Their misconduct was

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[22] See *David D. Esco, Jr.*, 46 S.E.C. 1205, 1207, n. 7 (1978) (Alleged bias of investigator did not affect the fairness of the NASD proceedings or findings.).

We further note that no showing of selective prosecution has been made. In addition to Amato's allegations, Boehmer questioned why salesmen in other offices and at other firms were not found to have charged excessive markups on sales of Barclays stock. He also quoted, second hand, an unnamed member of the NASD board in this case as saying that the NASD was "out to get the Penny Stock firms."

To establish selective prosecution, one must show both that he was singled out for enforcement action while others similarly situated were not, and that the action was motivated by arbitrary or unjust considerations, such as race, religion or the desire to prevent the exercise of a consti-tutionally-protected right. *U.S.* v. *Huff*, 959 F.2d 731 (8th Cir.1992); *C.E. Carlson, Inc.* v. *S.E.C.*, 859 F.2d 1429, 1437 (10th Cir.1988). Neither showing has been made here.

serious.[23] Despite indications of unfair pricing, they sold their customers securities at excessive markups, generating extravagant commissions for themselves.[24] Under the circumstances, we are unable to conclude that the sanctions imposed by the NASD are excessive or oppressive.[25]

An appropriate order will issue.[26]

By the Commission (Chairman BREEDEN, Commissioners SCHAPIRO, ROBERTS, and BEESE).

Jonathan G. Katz
Secretary

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[23] As discussed *supra*, Amato's conduct was particularly egregious, justifying more severe sanctions.

[24] Our finding of slightly fewer excessive markups than was found by the NASD (see n. 10 *supra*) does not justify any modification in the sanctions imposed by the NASD.

[25] We reject Amato's claim of excessive sanctions based upon the fact that more senior Firm personnel, who settled with the NASD, received what Amato characterized as "far more lenient treatment." See n. 1, *supra*. The appropriate remedial action depends on the facts and circumstances of each particular case and cannot be determined precisely by comparison with the action taken in other cases. See *Butz* v. *Glover Livestock Commission Co., Inc.*, 411 U.S. 182, 187 (1973). Moreover, we have observed that "in settled cases we take into account pragmatic considerations such as the avoidance of time-consuming and manpower-consuming adversary proceedings." *Blinder Robinson & Co., Inc.*, 48 S.E.C. 624, 636, n. 36 (1986).

[26] All of the contentions advanced by the parties have been considered. The contentions are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.